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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

FOR THE
MIDDLE DIVISION
DECEMBER TERM, 1904.

WESTERN DIVISION
APRIL TERM, 1905.

CHARLES T. CATES, JR.
ATTORNEY-GENERAL AND REPORTER.

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Rec. March 6, 1906

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³⁴Appointed to hold Second, Third and Fourth Divisions of Circuit Court Shelby County, created by Act of 1905.

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¹Appointed to office created by Acts of 1905.

²Appointed to vacancy created by death of Cave Johnson.

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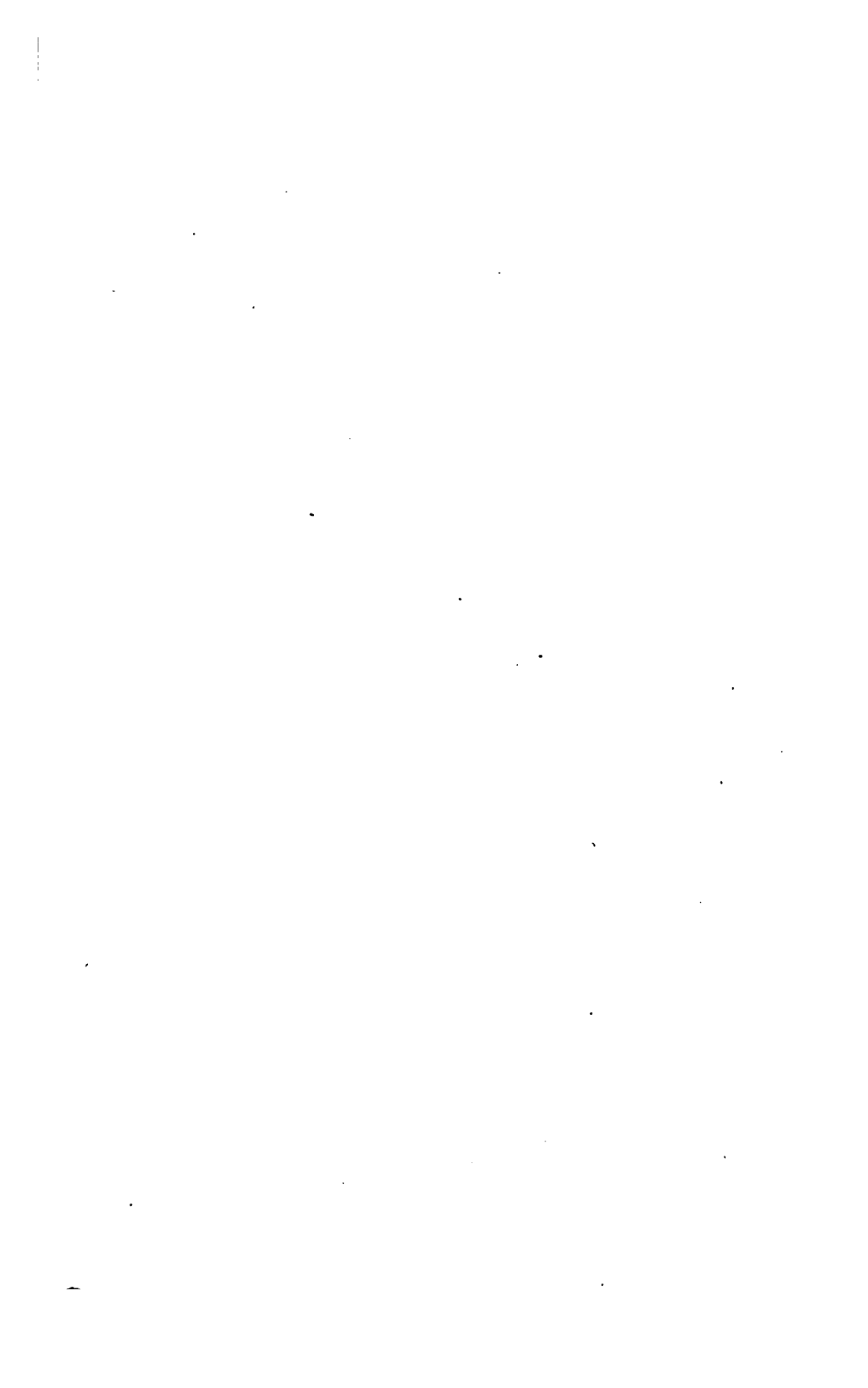
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CASES
ARGUED AND DETERMINED,
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1904.

MRS. LOUIE H. KEITH, *Exx.*, et al. v. RUSSELL A. ALGER.

(Nashville. December Term, 1904.)

1. **JUDGMENTS AND DECREES.** Of federal court set aside in State court for fraud.

A State court may entertain a bill to restrain the enforcement of a judgment or decree of a federal court on the ground that it was procured by fraud; and federal courts may entertain such a cause of action against a judgment or decree of a State court. (*Post*, p. 21.)

2. **SAME.** Bill to set aside, for fraud, is an independent right of action.

A bill to restrain the enforcement of a judgment or decree on the ground that it was procured by fraud is an independent right of action that does not involve a retrial of the issues disposed of in the former cause. (*Post*, p. 21.)

3. **SAME.** Fraud must be extrinsic or collateral to issues in former suit to authorize setting aside the judgment or decree therein.

The fraud for which a judgment or decree may be set aside must be some fraud extrinsic or collateral to the issues tried and the

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questions examined and determined in the suit in which the judgment or decree complained of was rendered. (*Post*, p. 21.)

Cases cited and approved: *Gaugh v. Henderson*, 2 Head, 628; *Smith v. Harrison*, 2 Heis., 230; *Mathews v. Massey*, 4 Bax., 450-458; *Talbot v. Provine*, 7 Bax., 502-507 et seq.; *Mabry v. Churchwell*, 1 Lea, 416, 432; *Haskins v. Rose*, 2 Lea, 708; *McDowell v. Morrell*, 5 Lea, 278; *Boro v. Harris*, 13 Lea, 36; *Pyett v. Hatfield*, 15 Lea, 473; *Williams v. Pile*, 104 Tenn., 273; *Noll v. Chattanooga Co.* (Chy. App.), 38 S. W., 287; *Pico v. Cohn*, 91 Cal., 129, 25 Am. St. Rep., 159-171, note; *Marshall v. Holmes*, 141 U. S., 589; *United States v. Throckmorton*, 98 U. S., 65, 66; *Surety Co. v. Bank*, 56 C. C. A., 657; *Railroad v. Wells*, 54 Am. St. Rep., 218-261, note; *Fealey v. Fealey* (Cal.), 43 Am. St. Rep., 111-118; *Friese v. Hummel* (Or.), 46 Am. St. Rep., 610-613; *Camp v. Ward* (Vt.), 60 Am. St. Rep., 929-933; *Merriman v. Walton* (Cal.), 30 L. R. A., 786, note; *Dowell v. Goodwin* (R. I.), 51 L. R. A., 873; *Jarrett v. Goodnow* (W. Va.), 32 L. R. A., 321-329; *Farwell Co. v. Hilbert* (Wis.), 30 L. R. A., 235-242, note.

Cases cited, distinguished, and approved: *Randall v. Payne*, 1 Tenn. Chy., 137, 142 et seq.; *Maddox v. Apperson*, 14 Lea, 596; *Marshall v. Holmes*, 141 U. S., 589.

4. SAME. Same. Instances of extrinsic or collateral fraud that will authorize setting aside a judgment or decree.

The extrinsic or collateral fraud that will authorize the setting aside of a judgment or decree may be the keeping of the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. (*Post*, pp. 22-26.)

Cases cited and approved: *Pico v. Cohn*, 91 Cal., 129; *United States v. Throckmorton*, 98 U. S., 65, 66.

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5. **SAME.** Same. Same. To set aside a judgment or decree, a meritorious case and injury by fraud must be shown by the complaining party.

In order to entitle a complainant to relief under a bill to set aside a judgment or decree on the ground that it was obtained by fraud, it must appear that such complaining party has a meritorious case, or had a meritorious defense to the original cause of action, and that he was injured by the fraud. (*Post*, pp. 26-28.)

Cases cited and approved: Mathews v. Massey, 4 Bax., 450-458; Railroad v. Wells (Ark.), 33 S. W., 208, 30 L. R. A., 560, 54 Am. St. Rep., 222; White v. Crow, 110 U. S., 183.

6. **PRACTICE.** No objection to conclusiveness of proceedings in federal courts under practice different from that of State courts.

The conclusiveness of the proceedings in the United States circuit court of appeals in an action between the parties in the State court is not affected by the fact that the proceedings were not conducted according to the forms of practice obtaining in the State courts in similar matters. (*Post*, p. 29.)

Cases cited and approved: Hilton v. Guyott (C. C.), 42 Fed., 252; Telford v. Brinkerhoff, 163 Ill., 443.

7. **RES ADJUDICATA.** Federal court's denial of petition to file a bill of review for newly discovered evidence showing fraud is *res adjudicata* against bill in State court to set aside judgment for fraud.

Where the application by petition in the federal court for leave to file a bill of review for newly discovered evidence showing that the judgment was obtained by fraud was denied, such denial is *res adjudicata* as to the right of petitioners to maintain a bill in the State court to set aside a judgment or decree of such federal court on the ground that it was obtained by fraud, though the truth of the matter contained in the petition filed in the federal court was settled against petitioners on *ex parte* affidavits, according to the forms and practice obtaining

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in the federal courts, without opportunity of examining and cross-examining the witnesses upon the matters involved, where the action of the federal court was based on the absence of any real or legal injury inflicted upon the petitioners by the fraud, and the want of any real equity in their claim, which is the basis of the State court's action in dismissing the bill to set aside the judgment or decree of the federal court on the ground that it was obtained by fraud. (*Post*, pp. 28-30.)

Cases cited and approved: Jarrett v. Goodnow, 32 L. R. A., 326-329, note; Merriman v. Walton, 30 L. R. A., 793.

FROM FRANKLIN.

Appeal from the Chancery Court of Franklin County.
—T. M. McCONNELL, Chancellor.

STATEMENT OF FACTS MADE BY MR. JUSTICE NEIL.

The bill in this case was filed by the complainant as executrix of John F. Anderson, and by certain other persons as his devisees and heirs at law, for the purpose of setting aside, for fraud, a judgment obtained against them in the circuit court of the United States, sitting at Nashville.

The bill alleged that John F. Anderson died in Franklin county about January 1, 1894, the owner of certain real estate, which he devised to the complainants.

The bill further alleges that prior to January 11, 1889, the said Anderson was the owner of 14,804 acres of mountain lands, and on said date executed to Sheri-

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dan, Green & Company, a real estate firm then doing business in Chattanooga, this State, an option and title bond, in which he obligated himself, for a consideration of \$500 cash paid, to make conveyance to the said firm of said mountain lands on the payment to him of \$4 per acre therefor; that subsequently, on March 4, 1889, said Anderson executed to the defendant, Alger, a general warranty deed, conveying to him the lands above mentioned, for the recited consideration of \$51,814 in cash, and three notes, due in one, two, and three years, aggregating \$44,412, and one other note for \$7,402, making altogether \$103,628; that out of the consideration thus paid by Alger the said Anderson was paid by Sheridan, Green & Company \$4 per acre for all of the land conveyed, less \$500 paid at the time of the execution of the option, the total amount received being less than \$60,000.

It is further alleged that on August 11, 1894, the defendant, Alger, filed a bill in the United States circuit court for the middle district of Tennessee against Sheridan, Green & Company and the present complainants; that in this bill Alger alleged that previous to the 4th day of March, 1889, he had agreed to purchase the 14,804 acres of land at the price of \$7 per acre, amounting in all to \$103,628; that on the 4th day of March, 1889, he closed the contract, and took from Anderson and wife a warranty deed to the property; that the purchase was made through Sheridan, Green & Company, as agents of Anderson; and that the said Alger was in-

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duced to buy the land by fraud and imposition perpetrated by the said Anderson and his agents, Sheridan, Green & Company, by several means, as follows, viz.:

"That they bribed and paid a large sum to one A. J. Freer, agent and timber expert of said Alger, who was sent to examine the timber on said lands, and who, on account of that bribe, falsely reported that he found timber thereon in quantity and quality as represented, whereas, in truth, there was but little timber of any value on said lands; that they procured false surveys to be made, including a large acreage of land to which Anderson had no title; that they procured the face of certain coal veins to be painted, whereby another agent of the said Alger, who was sent to examine the lands, was induced to report that there was a valuable coal deposit on said lands.

"It was averred by complainant in said bill (defendant, Alger) that he first had his suspicions as to the false representations concerning the quality of and title to said lands aroused in December, 1893, and then caused a survey to be made to ascertain the extent of the shortage; that this survey was not finished until April, 1894, and that then for the first time was revealed the full extent of the fraud perpetrated on him, that after this discovery as to the acreage he caused a full investigation to be made, and, to his great surprise, discovered the other frauds alleged, as hereinbefore stated. By means of these frauds the said Alger claimed that he had been imposed upon and induced to pay \$103,628

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for lands barely worth one-tenth of the sum, or at most not exceeding \$15,000, and in addition had been caused to pay out taxes on the lands amounting to \$1,500. By an amendment filed to said bill it was alleged that the land was then in the same condition as when purchased, and a reconveyance thereof was tendered with the said amendment. A rescission of the sale was prayed, together with a decree in favor of the said Alger for the purchase money, with interest, and all expenses, taxes, etc., paid on account of the sale. It was also charged in said bill that John W. Gonce, one of the defendants was a party to the sale, and had included in it a 5,000-acre tract of land which he had quitclaimed to John F. Anderson for the purpose of being included, and that this tract in fact contained but 4,000 acres. Gonce was alleged to have participated in the frauds practiced, and to have received part of the purchase money. Recovery was sought against O. J. Sheridan and W. C. Green, as members of the firm of Sheridan, Green & Company, on account of their perpetration of the fraud alleged in the bill."

It is further alleged in the present bill that two of the defendants to the bill just referred to filed their answer to Governor Alger's bill in the United States circuit court, denying that, at the time of the purchase made by Governor Alger of the said lands, Sheridan, Green & Company were the agents of Anderson, and averring that in fact the said firm were the vendees of Anderson under the option and title bonds already mentioned, and

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the vendors of the said Alger in the sale made to him, and responsible alone to him for the frauds committed by them; that John F. Anderson had no other connection with the sale, except to make conveyance, as he was bound to do by his bond for title, and that he received of the purchase money only \$4 per acre, the balance being the profits made by Sheridan, Green & Company; that all fraud, as far as he was concerned, was denied in that answer; and that it was also denied that complainant in that bill had but recently made the discoveries referred to in the bill.

It is further alleged in the present bill that O. J. Sheridan answered that bill, denying all frauds charged therein, and denying that he acted as agent for Anderson in the negotiations between his firm and Governor Alger, and averring that under the title bond they sold the lands on their own account.

The bill in the present case then proceeds as follows, viz.:

"On the pleadings and evidence introduced thereunder the cause was heard in the circuit court of the United States aforesaid on February 12, 1897, and the court, being of opinion that Sheridan, Green & Company were agents, and not vendees, of the said John F. Anderson, and because they had paid to A. J. Freer, the agent sent by the said Alger to examine and report on said lands, one-third of the profits made by them from the sale of the said lands to Alger, decreed that the sale be rescinded, set aside, and held for naught, and that

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the said Alger should reconvey the premises to Louie H. Keith, as executrix of the said Jno. F. Anderson, deceased, to be sold and disposed of by her as directed by the will of her testator, and that he recover of the said Louie H. Keith, as such executrix, the purchase price paid for such land, then amounting, with interest, to \$155,223.89, and \$960.25 on account of taxes paid by him on account of the lands. This recovery was declared a lien upon the lands ordered to be reconveyed to the executrix and a special commissioner was appointed to make sale of same unless the recovery should be paid within thirty days from the date thereof. Execution was awarded for any balance that might remain after crediting the decree with the proceeds of the sale. A decree was entered dismissing the bill as to O. J. Sheridan and W. C. Green, defendants named in the bill, and E. J. Linn, not named as a defendant; thus releasing them from all liability on account of the frauds charged. Decree was also rendered against Jno. W. Gonce for \$23,740.89.

"On June 10, 1897, Louie H. Keith, in her own right, and as executrix of Jno. F. Anderson, deceased, T. B. Anderson, Luke Anderson, and certain other devisees of Jno. F. Anderson, deceased, and Jno. W. Gonce, having obtained leave therefor, filed their supplemental bill setting forth the proceedings which had led to the decree aforesaid, and averring that since the rendition thereof they had discovered that, soon after the said lands were purchased by the said Russell A. Alger, he

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had learned that his agent, A. J. Freer, had been paid a part of the profits made by Sheridan, Green & Company, and had made no objection thereto, and that he had been fully advised after said sale of all of the facts and circumstances connected therewith, and that after being so informed he still retained the said Freer in his service, and had been exercising acts of ownership over said land, and had completed the purchase thereof by paying the notes for the deferred installments of purchase money, thus ratifying and confirming said sale.

"To this supplemental bill the said Alger filed his answer, denying that he had discovered the bribery of his agent, Freer, and the other circumstances attending said sale, soon after the same was consummated, and reciting the manner in which his attorneys at Winchester had put the information in the form of a letter, thus fixing on his mind how and when he received the knowledge of the bribery of Freer. He also denied that he still retained the said Freer in his employment, but admitted that he was employed in a corporation in which said Alger held an interest to a considerable extent.

"On the rehearing of said cause under the supplemental bill and new evidence introduced, and on the whole record, a decree was entered by the United States court aforesaid on April 20, 1899, setting aside the former decree in favor of the said Alger, and dismissing the bill filed by him. From this decree the said Alger petitioned for and obtained an appeal to the United States circuit court of appeals for the sixth circuit, ask-

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ing for a reversal of said decree because the circuit court erred in not granting a rescission (1) because of the corruption and bribery of Freer by John F. Anderson and his agents, Sheridan, Green & Company; (2) because Jno. F. Anderson fraudulently included in the sale lands to which he knew he had no title; and (3) because of the fraud of Jno. F. Anderson and his agents, Sheridan, Green & Company, in facing up and painting the coal entries, etc., and because the court erred in holding that the said Alger had been put on inquiry as to any one of the several frauds which had been practiced on him.

"On November 7, 1900, the appeal was heard and determined by the United States circuit court of appeals for the sixth circuit, and affirmed as to appellee Jno. W. Gonce, but reversed as to Louie H. Keith as executrix, and the heirs of Jno. F. Anderson, deceased, and remanded for the purpose of enforcing the original decree rendered by the circuit court, as already hereinbefore stated.

"A mandate having issued, the circuit court of the United States did on the 11th day of January, 1901, enter its final decree in said cause, whereby it was decreed that, because of the bribery of the said Freer by the said Sheridan, Green & Company, the sale aforesaid be rescinded and set aside, and ordering and adjudging that the said Russell A. Alger reconvey the premises to Louie H. Keith, as executrix of John F. Anderson, deceased, to be sold and disposed of by her as directed by

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the will of her testator, and adjudging against her a recovery in favor of the said Alger for the whole of the purchase money paid on account of said sale, then amounting, with interest, to the sum of \$201,014. 97, and for the further sum of \$1,243.52, taxes paid on said lands. To secure the payment of these recoveries, a lien was declared on the lands which the said Alger was ordered to reconvey to the said Louie H. Keith, and a sale thereof was directed unless said recoveries were paid within thirty days from the date thereof.

“Complainants further aver and charge that on or about the —— day of February, 1897, the defendant, Alger, bargained, sold, and executed, a deed conveying said 14,804 acres of land to Governor A. T. Bliss, of Michigan, for a large consideration then paid to him, and amounting, as complainants are informed, to \$85,000 or \$90,000. This conveyance was, as they are advised, a positive ratification of the purchase which said Alger was then seeking to rescind, and a parting with the title which he was, by the decree of the court, as before stated, ordered to reconvey to her. And they charge that the said Alger, in order to deceive the court and complainants, and to secure the rescission of the sale to him, concealed the conveyance or sale made by him to the said Bliss, and, in order to effect said concealment, he did, by and through his attorneys, request and procure the said Bliss not to record the deed conveying the said lands to him, and said deed was not in fact at that time, and has never since been, recorded.

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The making of said sale to Governor Bliss was purposely concealed, and all knowledge thereof suppressed, to enable defendant to impose on complainants and the court as before stated. But having concealed said conveyance, and having fraudulently procured a rescission of the sale as aforesaid, and a recovery for all the purchase money paid under the deed executed by the said Jno. F. Anderson, deceased, with interest, amounting as aforesaid to \$201,014.97, and a recovery also for taxes paid on account of said land, and a sale of said 14,804 acres of land to satisfy said large recovery, and having under said sale bought in said land, the said Alger did then, on May 11, 1901, for a recited consideration of \$1, and other valuable considerations then paid, convey the lands to the said Bliss.

“Complainants therefore further charge that the recited consideration was not the real consideration for said conveyance, and was made for the purpose of further deceiving complainants and keeping them in ignorance of the original sale made in February, 1897. Complainants are advised that the decree of rescission and the recovery obtained against the said Louie H. Keith as executrix was, on account of the facts stated, fraudulent, and should for that reason be set aside and held for naught. At the time this decree was rendered, defendant, Alger, was representing to complainants and the court that he was still the owner of the land conveyed to him by Jno. F. Anderson, deceased, although he had then parted with said title and could not recon-

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vey the said lands; and he procured a judgment to be entered in his favor for \$201,014.97, though he had received from Governor Bliss \$90,000 for these lands.

"Complainants further aver that by the fraudulent acts of defendant, Alger, as aforesaid, in concealing from complainants the fact that pending his suit for rescission he had conveyed the lands in controversy to the said A. T. Bliss, and was therefore unable at the time of the rendition of the decree aforesaid in his favor to reconvey the property, complainants were grossly deceived and imposed upon, and were thus prevented from setting up by way of defense to said suit the fact that said Alger had parted with the title to said lands and was unable to comply with the terms of the decree in his favor, and had by his own act waived the right to ask the relief sought, and placed himself in a situation that would have required a dismissal of his bill if the court had not been deceived.

"Complainants further aver that they had no knowledge of the fraud thus practiced on them by defendant, Alger, prior to the rendition of the decree aforesaid, on the 11th day of January, 1901, nor did they in fact know anything of the sale of said lands to A. T. Bliss until within the last few weeks. Complainants only learned of said sale to Bliss through statements made by said Bliss and his business agent, A. F. Cook, when said Bliss and Cook were in Chattanooga, in June and July last, seeking to sell the property which the said Bliss had purchased of defendant as aforesaid. Complain-

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ants aver that said Bliss and Cook both stated at the time aforesaid, distinctly and in detail, the circumstances of the sale of said lands by defendant, Alger, to said Bliss in February, 1897, and of the urgent request made by said defendant of said Bliss that the deed for the property which was executed at that time should not be registered, and the fact of said sale kept concealed until after defendant had obtained the decree aforesaid in his favor. Complainants fully acquit said Bliss and said Cook of any knowledge of or participation in the fraud practiced on them by defendant, Alger, and charge that they were persuaded to withhold the deed made February, 1897, from record, upon the false representation of defendant that he was engaged in clearing the title to the land, and that if the deed was recorded then it would complicate his litigation and embarrass him in his efforts to clear up the title. And complainants allege that they do not believe that either the said Bliss or the said Cook know even now the real reason why said defendant was so solicitous to keep concealed the fact of his sale of said lands to said Bliss at the time said sale was made.

“Complainants further aver that defendant, Alger, in order to more successfully conceal all knowledge of the aforesaid sale to Governor Bliss, and so prevent complainants from availing themselves of their legal right to have the bill of said defendant, Alger, dismissed, because of said sale, pending his said suit, caused the taxes on said mountain land from 1897 to

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1902, which were in fact paid by Governor Bliss, to be paid through defendant Alger's agent, one J. C. McCaul. Complainants charge that the money for said taxes was furnished by Governor Bliss to Alger's said agent McCaul, and by him transmitted to Tennessee, so that suspicion might not be aroused that defendant, Alger, had sold said land, and that Governor Bliss had become the owner thereof, as hereinbefore stated. Complainants further aver that one Frank Buchkosky, who was defendant Alger's agent in Tennessee in charge of said lands, at the time of the sale thereof to Governor Bliss in 1897, was after said sale employed in the same capacity by Governor Bliss, but that the fact that he had passed from the employment of said Alger to Governor Bliss was carefully concealed by defendant from the public and from the complainants, and, in order to make such concealment effective, said Buchkosky's salary, as in the case of the taxes aforesaid, was paid from 1897 to 1902 by the said J. C. McCaul, agent of defendant, Alger, although the money for said salary was furnished by Governor Bliss. By this means one more possible ground of suspicion was removed that defendant, Alger, had parted with the title to said land. Complainants aver that defendant, Alger, in thus carefully and systematically concealing from them all knowledge and all means of acquiring knowledge of the aforesaid sale of said lands, willfully and intentionally deceived complainants, and fraudulently deprived them of rights to

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which they were entitled under the law, as aforesaid, as the result of said sale."

The bill then alleges the institution of insolvency proceedings in the chancery court of Franklin county against the estate of Jno. F. Anderson by James G. Aydelotte and other creditors, the making of an order of reference as to debts, the assets, and the confirmation of the master's report allowing to R. A. Alger a debt of \$158,301.82, the balance left of his judgment of \$201,014.97, and interest thereon, and some taxes paid, after crediting thereon \$50,000 realized from a sale of the 14,804 acres of land, and that the defendant, Alger, was claiming a *pro rata* on this sum out of the proceeds of the residue of the land of the estate sold in that case for the payment of debts, and that the estate would not have proven insolvent, but for the Alger debt. It was also alleged that when the foregoing decree was entered the complainants did not know of the fraudulent manner in which Alger had procured the decree in the circuit court of the United States, and did not discover such fraud until a short time before the present bill was filed.

It is sought in the present bill to set aside the decree obtained in the chancery cause as a consequence of setting aside the decree in the circuit court of the United States.

A demurrer was filed to this bill, presenting the following points: (1) That the proper remedy of the com-

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plainants, under the facts stated, would be by bill of review in the court which rendered the judgment complained of; (2) that the new matter complained of did not go to the merits of the controversy; (3) that the complainants do not come into court with clean hands, inasmuch as it appears to be the purpose of the bill, from its face, to set aside a decree which only takes from them that which they procured from Alger by fraud, and thus enable them to retain the fruits of the fraud.

The chancellor overruled the demurrer, with leave to the defendant to rely upon the same grounds in his answer.

Thereupon the defendant filed a special plea of *res adjudicata*, the substance of which was that, after the proceedings in the present case were begun, the complainants filed their petition in the circuit court of appeals of the United States for the sixth circuit, which had finally determined the litigation between the parties to the present bill concerning the land in question, and had remanded the cause to the circuit court of the United States for the middle division of Tennessee for the entry of the final decree, and which latter court had entered such final decree pursuant to the mandate, in accordance with the practice obtaining in that jurisdiction, for leave to file a bill of review for newly discovered evidence (the same stated in the bill in the present case), and had accompanied said petition with a draft of the proposed bill of review, in which draft the same newly discovered matter set up in the present bill was

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set out and relied upon as ground for reopening the aforesaid final decree and for a retrial of the issues; that, in further compliance with the practice prevailing in said federal jurisdiction, both parties were permitted to file affidavits on said application in said cause in support of their respective contentions; and that upon the hearing of said matter the said United States circuit court of appeals denied the application, holding that the said new matter did not go to the merits of the controversy, and also that it was fully explained in the affidavits submitted by the present defendant, setting up and showing facts which made it clear to the court that the alleged conveyance to Bliss was in entire harmony with the claims put forward by the present defendant for rescission, in that the rights acquired by Bliss were to abide the result of the litigation, which results he was to receive either in the land, if that should be finally held to belong to the present defendant, or the decree for money, and lien and purchase of the land thereunder in case a rescission should be granted.

The foregoing proceedings were relied upon in the plea as an adjudication of the rights asserted in the bill.

This plea was set down for argument upon its sufficiency in the chancery court, and upon the argument of said motion the plea was held to be good. Thereupon the complainants declined to take issue upon the plea, and the chancellor entered a decree dismissing the bill.

From this decree the complainants prayed an appeal

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to this court. Here the cause, with the exception of the matters arising upon demurrer, was assigned to the court of chancery appeals. In that court the decree of the chancellor was affirmed, and the complainants thereupon again appealed to this court, and assigned errors. The court of chancery appeals, while not technically passing upon the grounds of demurrer, held that the bill on its face did not present a cause of action, and also held that the plea of *res adjudicata* was well filed, and sustained it upon its merits.

The errors assigned by the complainants in this court raise both questions, and are as follows:

"(1) The court of chancery appeals erred in holding that the facts alleged did not, in law, constitute ground for impeaching for fraud the decree of the United States circuit court of appeals, and the order of the chancery court of Franklin county in allowing said judgment as one of the claims against the estate of Jno. F. Anderson, deceased.

"(2) In holding that the judgment or order of the circuit court of appeals denying complainants' application to file bill for the purpose of reviewing said judgment was an adjudication between the parties of the same cause of action set up and averred in their bill of complaint in this cause."

WILLIAMS & LANCASTER and BROWN & SPURLOCK, for complainants.

ESTILL & LITTLETON and LYNCH & LYNCH, for defendant.

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MR. JUSTICE NEIL, after making the foregoing statement of facts, delivered the opinion of the Court.

1. There is no doubt as we think, that a State court may entertain a bill to restrain the enforcement of a decree or judgment of a federal court on the ground that the latter was procured by fraud. This is an independent right of action, that does not involve a retrial of the issues disposed of in such former cause. It has been held that the federal courts may entertain such a cause of action against a judgment of a State court. The reasons and the authorities on which they are based are fully considered in the case of *Marshall v. Holmes*, 141 U. S., 589, 12 Sup. Ct., 62, 35 L. Ed., 870; likewise in the case of *National Surety Company v. State Bank*, 56 C. C. A., 657, 120 Fed., 593, 61 L. R. A., 394. The same reasons control an application in a State court to restrain the enforcement of a decree or judgment rendered by a federal court.

2. While the writer of the present opinion was a member of the court of chancery appeals of this State that court had occasion to consider the nature of the action in the case of *Noll v. Chattanooga Company*, decided August 28, 1896, in an opinion reported in 38 S. W., 287. In that case the following excerpt from *Pico v. Cohn*, 91 Cal., 129, 25 Pac., 970, 27 Pac., 537, 13 L. R. A., 336, 25 Am. St. Rep., 159, was quoted with approval:

"That a former judgment or decree may be set aside and annulled for some frauds there can be no question,

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but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. . . . The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party has by some extrinsic or collateral fraud prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from court by a false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest." Citing the case of *U. S. v. Throckmorton*, 98 U. S., 65, 66, 25 L. Ed., 93. The court of chancery appeals in the Noll Case refused to set aside the decree attacked for fraud. On appeal to this court the decree of the court of chancery appeals was affirmed.

The two cases last referred to (*Pico v. Cohn* and *U. S. v. Throckmorton*) are leading cases upon the subject of which they treat, and they are sustained by the very great weight of authority. It would be an idle under-

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taking, if we should endeavor, within the limits of a judicial opinion, to discuss a tithe of the vast number of cases bearing upon the point. We shall only refer to the following extended notes containing a collection of the authorities bearing upon the various phases of the inquiry. The most extended discussion of the subject which we have encountered is to be found in the very able note to *Little Rock, etc., Ry. Co. v. Wells*, 54 Am. St. Rep., 218 to 261, inclusive. Other cases and notes in the same series are 25 Am. St. Rep., 159 to 171, containing the above-mentioned case of *Pico v. Cohn*, with a note attached thereto; *Fealey v. Fealey* (Cal.), 43 Am. St. Rep., 111 to 118; *Fricse v. Hummel* (Or.), 46 Am. St. Rep., 610-613; *Camp v. Ward* (Vt.), 60 Am. St. Rep., 929-933. See, also, *Merriman v. Walton* (Cal.), 30 L. R. A., 786, and extended note appended thereto; *Dowell v. Goodwin* (R. I.), 51 L. R. A., 873. See, also, on the general subject of the jurisdiction of equity in regard to injunctions against judgments, an extended note to *Jarrett v. Goodnow* (W. Va.), 32 L. R. A., 321-329, and note to *Jno. V. Farwell Co. v. Hilbert* (Wis.), 30 L. R. A., 235-242.

We have several cases in this State, other than *Noll v. Chattanooga Company*, in which the doctrine is recognized that the fraud complained of must be some matter extrinsic to the issues tried, although the principle is not distinctly formulated therein. *Pyett v. Hatfield*, 15 Lea, 473; *Gaugh v. Henderson*, 2 Head, 628; *Smith v. Harrison*, 2 Heisk., 230; *Mathews v. Mas-*

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sey, 4 Baxt., 450-458; *Talbot v. Provine*, 7 Baxt., 502-507 *et seq.*; *Mabry v. Churchwell*, 1 Lea, 416, 432; *Haskins v. Rose & Turner*, 2 Lea, 708; *McDowell v. Morrell*, 5 Lea, 278; *Boro v. Harris*, 13 Lea, 36; *Williams v. Pile*, 104 Tenn., 273, 56 S. W., 833.

We have been referred by counsel for complainants to the cases of *Randall v. Payne*, 1 Tenn. Ch., 137, 142 *et seq.*, and *Maddox v. Apperson*, 14 Lea, 596 as holding a contrary doctrine.

There is nothing in the first of these cases which is necessarily in conflict with the rule formulated in *Noll v. Chattanooga Co.*, *supra*.

In the second case referred to, in the discussion of the learned justice who delivered the opinion of the court, there seems to be a disposition to repudiate the doctrine laid down in *United States v. Throckmorton*, *supra*; but, when the case is closely examined, it will be seen that the objections stated consist not so much in a denial of the rule, as in a criticism of its want of definiteness, and of its uncertainty in practical application. It is true that courts will constantly experience embarrassment in deciding whether this or that fraud is extrinsic or intrinsic. While it is very clear that some are of the former character and others of the latter, there may be various occurrences which it will be found difficult to assign to one or the other classification; but the difficulty suggested, we think, cannot be soundly urged as a sufficient objection to the existence of the rule. It is perfectly clear that no one should be

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allowed to enforce a judgment which was procured by any of the fraudulent practices catalogued in *Pico v. Oohn*, supra, and *United States v. Throckmorton*, supra, or other similar fraudulent practices; but it is equally clear that there must be at some time an end of litigation, and that the parties to a record, or the privies thereto, should not, in general, be allowed to retry the same issues after final judgment and the exhaustion of correctory and appellate proceedings. Carried to its ultimate, there would be no end to such retrials. The second case could be retried by a third, and the third by a fourth, and so on *ad infinitum*, and nothing would ever be settled.

The case of *Marshall v. Holmes*, supra, is also cited as an authority in opposition to the rule above announced. An examination of the statement of facts preceding the opinion in that case will show that the ground of relief asserted against the judgment was, in effect, that the plaintiff in the judgment attacked in that case had entered into a conspiracy with the agent of the petitioner to defraud the petitioner by means of a forged letter; that the petitioner was not present at the original trial, had no knowledge of the forged letter or of its use on the trial, and did not discover any of these matters until too late to make use of them, otherwise than by the petition to set aside the judgment. This is the substance of the statement, as we construe it, and from these facts it appears there was really a fraud extrinsic to the issues in the cause for which relief

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might have been had, under the rule as laid down in the *Throckmorton* case. It is true that Mr. Justice Harlan, in laying down the basis of the court's action, while referring to the *Throckmorton* case, does not place the decision, in terms, upon that rule, but upon the broader rule "that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." Still there is no criticism of the rule as announced in the *Throckmorton* case, and, as already stated, the facts on which the decision was rested bring it within the rule of that case. At all events, we are of the opinion that the rule as stated in the *Throckmorton* case is the one supported by the weight of authority and by sound reason, when judgments are attacked for fraud only.

3. While we are of opinion that the facts stated in the bill concerning the fraud charged fall within the designation of matters extrinsic to the issues in the original cause, in that it appears from the allegations of the bill that Governor Alger did not content himself with the mere failure to divulge the fact that he had conveyed the land to Governor Bliss, but took active steps to conceal such conveyance, in receiving the money for the taxes from Governor Bliss and paying them through his own agent, J. C. McCaul, thus holding out

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to the world that he was still the owner of the property, instead of his vendee, and also in holding out Frank Buchkosky as his agent for the lands, when he was in fact the agent of Governor Bliss, thereby creating the impression that he still owned the lands, still complainants are not entitled to relief, under the facts stated in the bill, because they do not show any meritorious defense to the original cause of action. They do not really deny that the frauds were practiced as charged in the bill filed by Governor Alger in the United States circuit court. Likewise, they do not show that they were injured by the fraud now complained of, committed on the part of Governor Alger, since it appears from the bill that, notwithstanding the alleged conveyance to Governor Bliss, a rescission was really effected, and the land was sold in the proceedings referred to as the land of the Anderson estate, and they thereby got the full benefit of its value. It is true, under the allegations of the bill, they lost the technical advantage arising from the fact that the conveyance had been made by Alger to Bliss. It is possible that if the existence of such conveyance had been discovered in time, and proper pleadings had been filed, bringing the matter to the attention of the court, and no further facts had appeared, other than those appearing in the bill, it would have been decided by the United States circuit court, and on appeal by the circuit court of appeals, that Alger had lost the right to a rescission by such act of ratification; still it does not follow from this that the concealment

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of the evidence referred to was such a fraud as would justify this court in setting aside the former judgment or decree as one obtained by fraud. At last, in the light of events which have since followed, and which are shadowed forth in the bill, it is perceived that the conveyance was not intended really as a ratification of the fraud which had been practiced by Anderson upon Alger, but was merely a means of conveying to Bliss Alger's interest in the litigation. Moreover, as the estate of Anderson has received the full benefit of the land, under the allegations of the bill, by reason of the sale made of it under the decree attacked, it is perceived that the estate of Anderson was not, in a legal sense, injured by the fraud; that the claim now put forth is purely technical and is without any legal merit. In order to entitle a complainant to relief under the class of bills to which the present one belongs, it must appear that such complaining party has a meritorious case, and that he was injured by the fraud. *Mathews v. Massey*, 4 Baxt., 450-458; *Little Rock & Ft. S. Ry. Co. v. Wells* (Ark.), 33 S. W., 208, 30 L. R. A., 560, 54 Am. St. Rep., 222; *White v. Crow*, 110 U. S., 183, 4 Sup. Ct., 71, 28 L. Ed., 113.

4. Relief must also be denied to the complainants on the ground that their first duty was to apply to the court in which the case was tried by a proceeding for the correction of errors; that they have made such application by a petition for leave to file a bill of review for newly-discovered evidence; and that relief has, according to

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the forms obtaining in that jurisdiction, been denied to them. See the full citation of authorities in note to *Jarrett v. Goodnow*, 32 L. R. A., 326-329; also *Merriman v. Walton*, *supra*, 30 L. R. A., 793, and authorities cited.

It is no objection to the conclusiveness of the proceedings in the United States circuit court of appeals instituted to obtain relief that those proceedings were not conducted according to the forms of practice obtaining in our own courts in similar matters. *Hilton v. Guyott* (C. C.), 42 Fed., 252. And see *Telford v. Brinkerhoff*, 163 Ill., 443, 45 N. E., 156.

It is insisted for complainants that they should not be bound by the adjudication, because the truth of the matters contained in the petition filed in the circuit court of appeals was settled against them on *ex parte* affidavits, and they had no opportunity of examining and cross-examining witnesses upon the matters involved. But the circuit court of appeals placed its action upon two grounds, one of which was that the facts now before us, as set forth in the present bill, did not justify the granting of the relief sought.

It is perhaps true that the action of a court upon a bill of review could not in all cases be treated as *res adjudicata* of matter proper for a bill attacking the same decree for fraud in its procurement, and that there may be some cases wherein a bill of the latter description will be entertained, even after the refusal of a bill of review, or other effort to obtain a retrial in the original action, because of inadequacy of such relief; but we

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do not think that the present case falls among such exceptional instances, since the circuit court of appeals had power to grant complete relief, had the facts stated authorized such relief, and since, further, the basis of the court's action on the present application must be the same as that which controlled the circuit court of appeals in its action upon the face of the petition in that cause, viz., the absence of any real or legal injury inflicted upon them by the fraud charged, and the want of any real equity in complainants' claim.

It results that both assignments must be overruled and the judgment of the chancery court dismissing the bill affirmed.

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RAILROAD CO. v. BRUNDIGE *et ux.*

(Nashville. December Term, 1904.)

1. **CONTRACTS.** Mental capacity to make, is question for court and jury to determine.

The degree of mental capacity which the party whose act is called in question must have, to enable him to make a valid contract, is a question of law for the court to decide and whether such party has the required degree is a question of fact to be found by the jury from all the evidence; and the opinions of the witnesses are not competent evidence to determine either point.

Cases cited and approved: Gibson v. Gibson, 9 Yerg., 329; Kirkpatrick v. Kirkpatrick, 1 Tenn. Cas., 258; Wisener v. Maupin, 2 Bax., 358; Brown v. Mitchell (Tex. Sup.), 36 L. R. A., 64; Runyon v. Price (Ohio), 86 Am. Dec., 462; Van Zandt v. Ins. Co., 14 Am. Rep., 223; Walker v. Walker's Executor, 34 Ala., 469; White v. Bailey, 10 Mich., 159; May v. Bradlee, 127 Mass., 414.

Case cited and distinguished: Poole v. Dean, 152 Mass., 589.

2. **EVIDENCE.** Opinions of physicians inadmissible to determine contractual capacity. Case in judgment.

The mental capacity of the female plaintiff to execute a contract compromising the litigation, was practically the sole point in issue. There was proof showing that the compromise contract was executed by the wife at the request and in the presence of her husband. Evidence was offered by the defendant to show the existence of contractual capacity, to rebut which plaintiff offered the testimony of two physicians, which was admitted over apt objections of defendant, that in their opinion plaintiff was not in a condition to make a contract. Other facts shown made the case critically close upon the determining issue.

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Held: That the admission of the opinions of the physicians as to the mental capacity of the plaintiff, which was a question to be determined by the court and jury, was prejudicial error and ground for reversal.

See cases cited and approved under headnote 1.

FROM FRANKLIN.

Appeal in error from the Circuit Court of Franklin County.—S. D. McREYNOLDS, Judge.

CLAUDE WALLER, LYNCH & LYNCH and W. B. LAMB, for Railroad Company.

ESTILL & LITTLETON, for Brundige et ux.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

Mrs. W. S. Brundige, her husband joining her, sued the Nashville, Chattanooga & St. Louis Railroad Company for the recovery of damages for injuries sustained by her in a collision on its road; she being a passenger on one of the colliding trains.

The railway company pleaded not guilty and accord and satisfaction; the last plea being based upon a compromise made with Mrs. Brundige June 14, 1902, two days after the accident. Mrs. Brundige replied to this plea that at the time the compromise was made she was

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suffering from a profound mental shock and nervous prostration, caused by her injuries, and was incompetent to make a valid contract, and repudiated the settlement and tendered back the money paid her. Issue was joined upon this replication.

The railway company upon the trial did not seriously controvert that Mrs. Brundige was injured through its negligence, and the contest was narrowed to the question of whether she had sufficient mental capacity when the compromise was made to make a valid contract. There were verdict and judgment for the plaintiff below, and the railway company brings the case here, and assigns as error that there is no evidence to support the verdict; that the damages adjudged are excessive, and the result of prejudice, passion, and caprice upon the part of the jury; and the admission, over objection, of certain testimony of the plaintiff's witnesses Dr. Zurmehly and Dr. Spiller, to the effect that she did not have sufficient mental capacity to transact business and make a contract.

The determination of error last assigned will be decisive of the case.

The questions propounded to these witnesses, and their answers, are as follows:

Dr. Zurmehly:

"Q. State whether or not, at the time you speak of seeing Mrs. Brundige, you would say that she was in any condition to transact business or make a contract?

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"A. I should judge not. Of course, that is a matter of opinion."

Dr. Spiller:

"Q. In your opinion, was she in a condition, when you saw her on the second visit you refer to, on June 13th, to make a contract or to transact a business matter?"

"A. I should judge not."

Counsel for the railway company objected to this testimony on the ground that it was the conclusions of the witnesses, and the question of plaintiff's mental capacity to make a contract or transact business was not a matter for the witnesses to pass on, but a question for the court and jury to determine. These objections were overruled, and the testimony permitted to go to the jury.

This was error. The testimony was clearly incompetent, and should have been excluded. The degree or quantum of mental capacity which the party whose act is called in question must have, to enable him to make a valid contract, is a question of law for the court to decide, and whether said party has the required quantum is a question of fact to be found by the jury from all the evidence; and the opinions of witnesses are not competent evidence, in cases of this kind, upon either point. The mental capacity of the plaintiff to contract was also the direct point—practically the sole point—to be decided by the court and jury; and the admission of this testimony was, in effect, a substitution of the

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opinion of the witnesses upon both the law and the facts of the case for that of the triers provided by law to determine them. This cannot be done. The testimony of witnesses must relate to the facts, and it is the province of the court to determine the law, and the jury the ultimate facts. Witnesses, in cases involving mental capacity, after stating the facts within their knowledge, may give their opinion, formed from those facts, of the soundness or unsoundness of the mind of the party in question, but cannot be permitted to express an opinion whether such party had sufficient mental capacity to make a contract or execute a will, as the case may be. There seems to be but little or no conflict in the authorities upon this subject.

In *Gibson v. Gibson*, 9 Yerg., 329—a contested will case—the witness was asked: “Whether from the situation in which he saw the old man on that morning, and from the facts he had just stated to the jury, he believed the old man was then in his senses and capable of making a will?” This court, in approving the action of the trial judge sustaining an objection to the question, said: “The latter part of the question—capable of making a will—as it involved a question of law and fact and the very question to be determined by the jury, was entirely illegal.”

In *Kirkpatrick v. Kirkpatrick*, 1 Tenn. Cas., 258, it is said: “The court erred in permitting certain witnesses to state their opinion as to the testator’s mental capacity to make a reasonable disposition of his prop-

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erty. This was a mixed question of law and fact, and the very inquiry to be determined by the jury upon the facts."

And again, in the same case, it is said: "The witness cannot be asked a question, the answer to which involves a matter of fact, as whether the testator is capable of making a will."

This was also held in the later case of *Wisener v. Maupin*, 2 Baxt., 358.

The rule is well and correctly stated by Mr. Pritchard, in his valuable work on Wills and Administration, section 106, in these words: "Attesting witnesses, and they only, are permitted to give their opinions, merely, without stating facts upon which they are based. But neither an attesting witness, nor any other, can be asked or allowed to state whether or not the testator was capable of making a will, or, what is the same thing, whether he was of disposing mind and memory. That involves a question of law for the court to settle, as to the quantum of mental capacity necessary to enable a person to make a legal disposition of his estate."

In the well-considered case of *Brown v. Mitchell* (Tex. Sup.), 31 S. W., 621, 36 L. R. A., 64, in holding that witnesses cannot be permitted to give their opinion of the mental capacity of a person to make a will or contract, the supreme court of Texas says:

"The negative of this proposition is that no witness, whether he be a subscribing witness, an expert, or a

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nonexpert, will be permitted, over objection, to state his opinion of the capacity of the testator or the maker of a contract to make such instrument when the opinion assumes the shape and has the effect of being an opinion upon the legal capacity of the party in question."

Other authorities to the same effect are *Runyan v. Price* (Ohio), 86 Am. Dec., 462; *Van Zandt v. Life Insurance Company*, 14 Am. Rep., 223; *Walker v. Walker's Ex'r*, 34 Ala., 469; *White v. Bailey*, 10 Mich., 159; 1 Greenleaf on Evidence, sec. 440.

All the cases from which we have quoted and have cited, it is true, involved the testamentary capacity of testators, but the principle upon which they were decided applies with equal force to cases involving the mental capacity of parties to contract. The testimony, whether it relate to a will or contract, is the opinion of the witness of the capacity of the party in question to do the act attacked as invalid, and which is the direct point in issue, and to be determined by the court and jury. In both cases a mixed question of law and fact is involved, and the admission of such evidence is to substitute the opinions of witnesses for the judgment of the court and jury upon these matters. The case of *Bruce v. Beall*, 99 Tenn., 303, 41 S. W., 445, in which the judgment of the trial court was reversed for error in permitting an expert witness to give his opinion on the matter to be decided by the jury, is also in point. It is there said: "While the general rule is that witnesses must speak to the facts, yet, upon questions of skill and

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science, men who have made the subject-matter of investigation the object of their particular study are competent to give their opinion in evidence. But they will not be permitted to state their opinion upon any point the jury has to decide. Deductions from facts belong to the jury, and, when the examination extends so far as to substitute the opinion of the witness upon the very issue in controversy for that of the jury, the province of that tribunal is unwarrantably invaded."

The case chiefly relied upon by the defendants in error to sustain the action of the trial judge in admitting this testimony is that of *Poole v. Dean*, 152 Mass., 589, 26 N. E., 406. While there is in one part of the opinion a statement that tends to do this, yet, when the entire opinion is considered, it is not in conflict with our cases; and the case of *May v. Bradlee*, 127 Mass., 414, is clearly in accord with them.

This testimony was clearly prejudicial to the plaintiff in error. The compromise pleaded had been made by Mrs. Brundige in the presence and by the request of her husband, and acquiesced in by them for some time; and there was much in their testimony tending to show that Mrs. Brundige had the capacity to make the contract, and fully understood and assented to it, which, with other potent facts testified to by the witnesses for both parties, made the case critically close upon this issue for the defendants in error. The incompetent testimony had been called sharply to the attention of the jury by the objection made to it and overruled, was upon

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the direct point being tried, and necessarily must have had great weight with the jury in arriving at its verdict.

It is not necessary to pass upon other errors assigned, as for this one the case must be reversed and remanded for a new trial.

Cooper v. Flemming.

COOPER v. FLEMMING.

(Nashville. December Term, 1904.)

1. MALICIOUS PROSECUTION. Advice of counsel tends to rebut malice.

In an action for malicious prosecution, the fact that the defendant acted on the advice of counsel in the prosecution for which he is sued may properly be considered by the jury as tending to rebut the existence of malice. (*Post*, p. 46.)

Case cited: *Brewer v. Jacobs* (C. C.), 22 Fed. R., 217.

2. SAME. Advice of counsel furnishes immunity from damages for, when.

That the defendant in an action for malicious prosecution commenced the prosecution for which he is sued in pursuance of the advice of counsel establishes the existence of probable cause and, as a matter of law, entitles the party sued to complete immunity from damages, provided: such advice was honestly sought, and all the material facts relating to the case, ascertained or ascertainable by due diligence, were presented to the counsel. (*Post*, pp. 46-52.)

Citations: *Note to Ross v. Hixon*, 26 Am. St. Rep., 144; *Cooley on Torts*, p. 183; *Newell on Malicious Prosecution*, p. 255, note.

Case cited and distinguished: *Graham v. Life Association*, 98 Tenn., 61, 37 S. W., 995.

Cases cited and disapproved: *Hall v. Hawkins*, 5 Humph., 359; *Kendrick v. Cypert*, 10 Humph., 291.

Cases cited and approved: *Stewart v. Sonneborn*, 98 U. S., 196, 25 L. Ed., 116; *Snow v. Allen*, 1 Stark., 502; *Ravenga v. Mackintosh*, 2 Barn. & C., 693; *Walter v. Sample*, 25 Pa., 275; *Cooper v. Utterbach*, 37 Md., 282; *Olmstead v. Partridge*, 16 Gray, 381; *Ash v. Marlow*, 20 Ohio, 119; *Hill v. Palm*, 38 Mo., 13; *Eastman v. Keasor*, 44 N. H., 519; *Wicker v. Hotchkiss*, 62 Ill., 107; *An-*

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derson v. Friend, 71 Ill., 475; Davis v. Wisher, 72 Ill., 262; Stone v. Swift (Mass.), 4 Pick., 389; Whitfield v. Westbrook, 40 Miss., 311; Leafrd v. Davis, 17 Ala., 27; Levy v. Brannan, 39 Cal., 485; Blunt v. Little, 3 Mason, 102, Fed. Cas. No. 1578; Sappington v. Watson, 50 Mo., 83; Glascock v. Bridges, 15 La. Ann., 672; Bartlett v. Brown, 6 R. I., 37; Davenport v. Lynch, 51 N. C., 545; Paddock v. Watts, 116 Ind., 146; Adams v. Bicknell, 126 Ind., 210.

Other cases cited: Maudlin v. Ball, 104 Tenn., 598, 58 S. W., 248; Morgan v. Duffy, 94 Tenn., 686, 30 S. W., 735; Vance v. Phoenix Ins. Co., 4 Lea, 385; Memphis Gayoso Gas Co. v. Williamson, 9 Helsk., 342.

- 3. CHARGE OF COURT.** Error to charge that advice of counsel is not sufficient evidence of probable cause if unsound in law.

An instruction to the jury in an action for damages for an alleged malicious prosecution on a charge of wilfully and wantonly breaking and throwing down the fence inclosing the land of another, that "the advice of the district attorney would be sufficient evidence of probable cause, provided such advice was warranted by the law governing the offense of wantonly and wilfully throwing down the fence of another" is reversible error. (*Post*, pp. 46, 47.)

- 4. SAME.** Error to charge that jury are to determine whether advice of counsel was sound in law.

It was also reversible error to instruct the jury in such case that "whether the opinion of the attorney-general was justified by the foregoing statute was a question to be determined by the jury." (*Post*, p. 47.)

- 5. SAME.** Refusal to charge. Error to decline to charge that advice of counsel, properly obtained, constitutes probable cause, although erroneous in law.

It was also reversible error, in such case, for the trial judge to decline to charge, although requested so to do, that "the advice of the district attorney, based upon an honest and full presenta-

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tion of all the material facts, would constitute probable cause, and a complete defense to the action, although such advice was based upon an erroneous construction of the statute." (*Post*, pp. 47, 52.)

See cases cited under headnote 2.

6. PROBABLE CAUSE. A mixed question of law and fact.

The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it are true and existed is a matter of fact, but whether, supposing them to be true, they amount to a probable cause, is a question of law. (*Post*, p. 52.)

7. SAME. Same. Proper practice.

It is the duty of the court, when evidence has been given to prove or disprove probable cause, to submit to the jury its credibility and what facts it proves, with instructions that the facts found amount to probable cause, or that they do not. (*Post*, pp. 52, 53.)

Cases cited and approved: *Stewart v. Sonneborn*, 98 U. S., 187; *Memphis Gayoso Gas Co. v. J. M. Williamson et al.*, 9 Helsk., 342.

FROM PUTNAM.

Appeal in the nature of a writ of error from the Circuit Court of Putnam County.—CORDELL HULL, Judge.

L. D. SMITH, O. C. CONATSER, A. ALGOOD, THOS. FINLEY and JAMES COOPER, for Cooper.

HAMILTON PARKS, T. L. DENNY, and O. K. HOLLADAY, for Flemming.

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MR. JUSTICE MCALISTER delivered the opinion of the Court.

The plaintiff below, Glen Flemming, recovered a verdict and judgment against William Cooper for the sum of \$1,500, as damages for an alleged malicious criminal prosecution. Pending a motion for a new trial, a remittitur of \$500 was entered, and thereupon the court pronounced judgment in favor of the plaintiff for \$1,000.

The defendant, William Cooper, appealed, and has assigned errors.

The present suit grew out of the indictment of the defendant in error, Glen Flemming, in the circuit court of Putnam county, at the instance of William Cooper, on a charge of willfully and wantonly breaking and throwing down the fence inclosing the land of said Cooper. The indictment was based on subsection 10, section 6496, Shannon's Code, as follows:

"It is declared to be a misdemeanor to willfully and wantonly break, thrown down, mar, deface or otherwise injure any fence, hedge or ditch inclosing the land of another."

At the May term, 1900, Flemming was tried on said indictment and acquitted. He thereupon instituted the present action against William Cooper for the malicious prosecution of said criminal cause.

The facts disclosed in the record are that on the 25th of August, 1898, William Cooper, for a valuable consideration, bought of Jesse and Lucinda Welch a tract

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of land comprising about seventy-five acres, and being a portion of what is denominated in the record the "Huddleston Tract." It appears that Jesse and Lucinda Welch had been in possession of this land, by house and inclosures, since 1874. At the date of said purchase Welch had a small inclosure, of a quarter of an acre, upon said 75-acre tract. It also appears that at the date of the Cooper purchase Mrs. Cornelia Flemming, mother of the defendant in error, also had a deed covering this tract of land, and was asserting title thereto. In October, 1899, the husband of Mrs. Flemming, learning of this inclosure upon the land, and that it was claimed by Cooper, went and removed the same. Cooper, upon learning that Flemming had torn down this inclosure, went to Flemming, and informed him that the inclosure was his; that he (Cooper) had purchased the land from Welch, with said inclosure erected thereon—and informed Flemming that he (Cooper) intended to rebuild the inclosure, and admonished him not to tear it down again. Shortly thereafter, Cooper rebuilt the fence, inclosing about one-fourth of an acre, and caused it to be planted in corn. Thereupon the defendant in error; Glen Flemming, acting under the direction and authority of his father and mother, again tore down this improvement, throwing part of the rails over the bluff. Cooper thereupon consulted the Honorable M. G. Butler, attorney-general of the district, and laid before him the facts already stated, and, in addition, communicated the fact to the attorney-general

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that Mrs. Flemming, the mother of the defendant in error, Glen Flemming, asserted title to the land, and had title papers covering the same, but that he was in possession of the property, and that the Flemmings had no possession upon this strip of land upon which the inclosure was located. The attorney-general, upon the state of facts disclosed to him, was of opinion that it was not a question of title, but of possession, and advised a criminal prosecution against the defendant in error, Glen Flemming. The indictment was thereupon found, with the result already stated.

Now it is insisted in behalf of the plaintiff in error that the uncontradicted evidence shows that, before commencing said criminal prosecution, Cooper consulted the district attorney-general, and laid before him all the facts of the case, whereupon said district attorney advised that the facts so stated constituted an offense against the statute, and that said prosecution was begun and carried on in good faith under said advice. It is maintained that there is no evidence whatever to show want of probable cause, and that the advice of the district attorney was a complete defense to this suit.

It is insisted, however, on behalf of the defendant in error, that the plaintiff in error, Cooper, failed to disclose to the district attorney two material facts, viz.:

(1) That he (Cooper) had made a survey and map for J. G. Flemming and wife, showing a derangement of the Flemming title to this land, and also the Huddleston entry, exhibiting the conflict between the titles,

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and the superiority of the Flemming claim under the paper title.

(2) It is further insisted that the plaintiff in error failed to disclose to the district attorney the fact that after he bought the land he had told J. J. Flemming and Glen Flemming that he knew nothing of the inclosure in controversy, and had nothing to do with it.

What, then, is the legal effect of the advice of the official representative of the State in respect of this matter?

In some cases it has been held that advice of counsel should be considered rather as tending to rebut malice, than as bearing upon the issue of probable cause. *Brewer v. Jacobs* (C. C.), 22 Fed., 217.

While it is true that the advice of counsel may properly be considered by the jury as tending to rebut the existence of malice, we think the weight of authority is that its fundamental purpose is to establish the existence of probable cause, and when said advice has been honestly sought, and all the material facts relating to the case, ascertained or ascertainable by the exercise of due diligence, have been presented to counsel, and a prosecution is commenced in pursuance of such advice, then it is the province of the court to charge the jury, as matter of law, that such advice of counsel entitles the party sued to complete immunity from damages. See extensive note to *Ross v. Hixon*, 26 Am. St. Rep., 144, where the authorities on this subject are collected.

The trial judge instructed the jury that the advice of

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the district attorney would be sufficient evidence of probable cause, provided such advice was warranted by the law governing the offense of wantonly and willfully throwing down the fence of another. He further charged that, whether the opinion of the attorney-general was justified by the foregoing statute was a question to be determined by the jury. Counsel for plaintiff in error requested the court to charge that the advice of the district attorney, based upon an honest and full presentation of all the material facts, would constitute probable cause, and a complete defense to the action, although such advice was based upon an erroneous construction of the statute. His honor, however, refused the instructions asked.

We are of opinion that in the instructions given, and in the refusal of those submitted on this subject, the trial judge was in error. It is probable the error was committed in following instructions which had been given on this subject by the trial judge in *Graham v. Life Association*, 98 Tenn., 61, 37 S. W., 995. But an examination of that case will disclose that the question now being considered was not raised and the charge of the circuit judge was copied into the opinion for the purpose of showing that a supplemental request had been covered by the general charge. It is also true that in *Hall v. Hawkins*, 5 Humph., 359, it was said, "The fact that a party acted upon the opinion of counsel will not excuse him, if the statement of facts upon which the

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opinion was founded was incorrect, or the opinion itself unwarranted."

So, in *Kendrick v. Cypert*, 10 Humph., 291, it was said, "The opinion of counsel, to be available, must be honestly sought and understandingly given." *Mauldin v. Ball*, 104 Tenn., 598, 58 S. W., 248; *Morgan v. Duffy*, 94 Tenn., 686, 30 S. W., 735; *Vance v. Phoenix Ins. Co.*, 4 Lea, 385; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk., 342.

A review of the authorities has satisfied us that such a statement of the law is unsound, and in conflict with the overwhelming weight of authority in this country and in England. It is certainly a legal anomaly to say that a man, before commencing a criminal prosecution, may take the advice of counsel, but, if it turns out to be unsound, it affords no protection.

But it may be said that knowledge of the law must be imputed to the prosecutor, and that he cannot be deemed to proceed upon probable cause when the advice of counsel is contrary to the law. If this view be correct, then the advice of counsel, if erroneous, would cut no figure in the case, except as tending to rebut the presumption of malice that would arise from the absence of probable cause. As stated by the learned annotator in *Ross v. Hixon*, supra: "If the prosecutor's conduct is to be considered upon the assumption that he knew the law, the advice of counsel can never protect him. For, if the advice be correct, he is subject to no liability and needs no protection, but, if incorrect, he is charged

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with knowledge of its incorrectness, and denied the defense of probable cause." But the great weight of authority, as well as the principle underlying this subject, is opposed to this view of the case.

In *Stewart v. Sonneborn*, 98 U. S., 196, 25 L. Ed., 116, the following request refused by the district judge was held to embody a sound principle of law, viz.: "If the jury believe from all the evidence that A. T. Stewart & Company acted on the advice of counsel in prosecuting their claim against Sonneborn in the circuit court of Barbour county, and, upon such advice, had an honest belief in the validity of their debt, and their right to recover in such action, and, in the institution of the bankruptcy proceedings, acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provides for the collection of a debt they believed to be a *bona fide* debt, they having first given a full statement of the facts in the case to counsel, then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action."

The court held that the facts stated in the point proposed, if believed by the jury, were a perfect defense to the action; that they constituted, in law, a probable cause; and, being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover. Citing *Snow v. Allen*, 1 Stark., 502; *Ra-*

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venga v. Mackintosh, 2 Barn. & C., 693; *Walter v. Sample*, 25 Pa., 275; *Cooper v. Utterbach*, 37 Md., 282; *Olmstead v. Partridge*, 16 Gray, 381.

"These cases," said the court, "and many others that might be cited, show that, if the defendants in such a case as this acted *bona fide* upon legal advice, their defense is perfect."

In *Ash v. Marlow*, 20 Ohio, 119, it was said that where a party has communicated to his counsel all the facts bearing on the case of which he has knowledge or could ascertain, and has acted upon the advice received honestly and in good faith, want of probable cause is negatived, and an action for malicious prosecution will not lie. *Hill v. Balm*, 38 Mo., 13; *Eastman v. Keasor*, 44 N. H., 519; *Walter v. Sample*, 25 Pa., 275; *Wicker v. Hotchkiss*, 62 Ill., 107, 14 Am. Rep., 75; *Anderson v. Friend*, 71 Ill., 475; *Davis v. Wisher*, 72 Ill., 262; *Stone v. Swift*, 4 Pick., 389, 16 Am. Dec., 349; *Whitfield v. Westbrook*, 40 Miss., 311; *Leaird v. Davis*, 17 Ala., 27; *Levy v. Brannan*, 39 Cal., 485; *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1,578; *Sappington v. Watson*, 50 Mo., 83; *Cooper v. Utterbach*, 37 Md., 282; *Glascok v. Bridges*, 15 La. Ann., 672; *Bartlett v. Brown*, 6 R. I., 37, 75 Am. Dec., 675; *Davenport v. Lynch*, 51 N. C., 545.

Mr. Cooley, the eminent legal writer, in his work on Torts, page 183, says:

"It may, perhaps, turn out that complainant, instead of relying upon his own judgment, has taken the advice

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of counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice; and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts."

This statement of the rule was approved by the supreme court of Indiana in the case of *Paddock v. Watts*, 116 Ind., 146, 18 N. E., 518, 9 Am. St. Rep., 832; in which case it was said:

"Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turn out that he was mistaken. But in order that he may obtain immunity, he must have made a full and fair statement of all the facts known to him." *Adams v. Bicknell*, 126 Ind., 210, 25 N. E., 804, 22 Am. St. Rep., 576.

In analogy to this rule on the subject of advice of counsel, it is held that, where the judgment of conviction is established, it is conclusive of the question of probable cause, provided the court had the jurisdiction of the parties and subject-matter, and the cause was presented by the prosecuting witnesses, and the judgment was not

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procured by fraud or subornation of perjury. Newell on Malicious Prosecution, p. 255, note.

So in *Memphis Gayoso Gas Co. v. J. M. Williamson et al.*, 9 Heisk., 343, the action was to recover damages for the wrongful suing out of an injunction. It appears that the injunction was granted, and jurisdiction of the case entertained by Judge Trigg after argument; and this court held that fact, as matter of law, was sufficient evidence of probable cause, until overturned by evidence of fraud or improper conduct in procuring the decision to be made.

The charge of the circuit judge on the trial of the present case is further attacked upon the ground that he instructed the jury that whether the opinion of the attorney-general was justified by the statute was a question to be determined by them. The court was clearly in error in giving this instruction. The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it are true and existed is a matter of fact, but whether, supposing them to be true, they amount to a probable cause, is a question of law. It is "the duty of the court, when evidence has been given to prove or disprove the existence of a probable cause, to submit to the jury its credibility and what facts it proves, with instructions that the facts found amount to probable cause, or that they do not." *Stewart v. Sonneborn*, 98 U. S., 187, 25 L. Ed., 116.

This is the established rule in this State. *Memphis Gayoso Gas Co. v. J. M. Williamson et al.*, 9 Heisk., 342.

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In the latter case it was held, while the facts from which probable cause is to be deduced are to be tried by the jury, the deduction as matter of law must be made by the court. This must be done in one of two modes: Either the court must state hypothetically to the jury the facts relied on by both sides, and whether or not they will, if established, satisfy the allegations in the pleadings, or the jury must find the facts specially, and from such special verdict the court must determine whether a reasonable man would have instituted a suit on them.

Reversed.

Thompson v. Blanks et al.

THOMPSON v. BLANKS *et al.*

(*Nashville.* December Term, 1904.)

1. **JUSTICE'S EXECUTION.** Lien of levy How preserved.

The levy of an execution from a justice of the peace on land creates a lien from the date of its levy; but, in order to continue the lien beyond ten days from the date of the levy, so as to affect third parties, the execution must be filed and docketed in the circuit court within the ten days, and the remaining papers in the case must be returned by the justice to the first term of the court thereafter.

Act cited and construed: Acts 1899, ch. 39, p. 54.

2. **SAME.** Same. Not sufficient to merely deposit execution in clerk's office.

It is the filing and docketing that makes the lien effective as to third persons after the expiration of ten days from the date of the levy, and it is not sufficient to merely deposit the execution in the clerk's office.

Cases cited: Hickman v. Perrin, 6 Cold., 135; Turbeville v. Fowler, 101 Tenn., 94, 46 S. W., 577.

3. **SAME.** Same. Lien suspended until execution filed and docketed.

Unless the execution is filed and docketed in the circuit court within the ten days, the lien is suspended, and does not exist, as against third parties, until it is so filed and docketed.

FROM CANNON.

Appeal from Chancery Court of Cannon County.--
WALTER HANCOCK, Chancellor.

Thompson v. Blanks et al.

S. S. BROWN, for Thompson.

JESSE DAVENPORT, for Blanks et al.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a question of priority between a purchaser and an execution creditor on certain real estate interests.

Complainant bought the interests of his brothers J. H. and H. L. Thompson in the estate of their father, H. L. Thompson, in January and April, 1903.

The father died in July thereafter.

On the 27th of July, after the death of their father, these conveyances were registered in Cannon county, where the land lies.

It appears that an execution issued upon a judgment of justice of the peace on July 13, 1903, and was levied same day upon the interests of J. H. and H. L. Thompson, and was returned to the circuit court clerk July 22, 1903. This execution was afterwards withdrawn, and sent back to the justice of the peace who issued it, and was returned to the office of the clerk August 11, 1903, and was then, with the other papers in the case, docketed.

The determination of the question at issue depends upon the proper construction of the act of 1899 (Acts 1899, p. 54, c. 39), to regulate the lien of justice's execution levied on land.

The first section of that act provides, in substance, that when ten days have expired after the levy the title

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to the real estate shall not be affected as to third parties until said execution or the papers in the cause are filed in the circuit court of the county where the land lies.

The second section provides that the officer making the levy shall within ten days thereafter return the execution to the circuit court, when said cause will be at once docketed, and he will return the fact of the return of said execution to the circuit court to the justice issuing the execution, whereupon the justice shall file the remaining papers in the cause, as now required by law.

The object and purpose of the law is to prevent secret liens under justices' judgments by requiring the executions levied on the land to be filed and docketed in the circuit court of the county where the land lies.

It appears that the execution was levied and returned to the circuit clerk before the conveyance to complainant was registered, but it was not docketed or filed by the clerk. It was then withdrawn, leaving nothing to show the levy in the clerk's office, and was not returned and docketed, as the law requires, until after the conveyance to complainant was registered.

While the act is somewhat ambiguous and indefinite, its evident meaning is that the levy of an execution from a justice of the peace on land creates a lien from the date of its levy; but, in order to continue the lien beyond the ten days from the levy, the execution must be returned to the circuit clerk and filed and docketed in the court. Within ten days after the levy is made the officer making the levy must notify the justice who has charge of the

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papers in the case in which the execution is issued of the fact, and the justice must thereupon file the remaining papers in the cause, as now required by law, in order that the property may be condemned for sale.

If the execution is filed and docketed within ten days after its levy, and the papers are returned by the justice of the peace, as heretofore required by law—that is, to the first term of the court thereafter—then there will continue a lien from the date of the levy as to third persons.

The question arises, what effect shall be given to the levy if the execution is not filed and docketed in the circuit court within the ten days, although it may be deposited in the office of the clerk of that court?

In *Hickman v. Perrin*, 6 Cold., 135, it was held that when a deed is noted for registration in the register's office, and withdrawn before registration by the party beneficially interested, it gives no priority, and it only takes effect from the date of its return to the office. See, also, *Turbeville v. Fowler*, 101 Tenn., 94, 46 S. W., 577.

We are of opinion that it is the filing and docketing that makes the lien effective as to third persons, after the expiration of ten days from the date of the levy; and unless the execution, or the papers including the execution, are filed and docketed within the ten days, the lien is suspended, and does not exist, until they are filed and docketed.

We are of opinion, therefore, that the purchaser is entitled to priority in this case, and the decree of the court of chancery appeals is affirmed.

Payne v. Satterfield.

PAYNE v. SATTERFIELD.

(*Nashville*. December Term, 1904.)

1. **APPEAL.** Does not lie until final decision.

It is a well-settled rule, save where changed by statute, that questions arising in the course of legal proceedings cannot be reviewed in an appellate court until a final decision in the cause has been rendered in the court below.

Cases cited: *Evans v. Shields*, 3 Head, 71; *Kendall v. Lassiter*, 68 Ala., 181; *Lester v. Berkowitz*, 125 Ill., 307, 17 N. E., 706; *Pistor v. Hatfield*, 46 N. Y., 249; *Luxton v. North River Bridge Co.*, 147 U. S., 337.

2. **SAME** By statute, allowed before final decision only in equity cases.

The appeal allowed before final decree by statute (Code, sec. 4889 (S.)) is confined to equity cases, tried either in the circuit or chancery court, and cannot be granted in a case involving no equitable principle.

Code cited and construed: Secs. 4887, 4888, 4889 (S.); secs. 3872, 3873, 3874 (M. & V.); secs. 3155, 3156, 3157 (T. & S. and 1858).

3. **SAME.** Case where premature.

An action to recover damages for deceit alleged to have been practiced in the sale and purchase of real estate does not fall within the provisions of the Code cited in headnote above, numbered 2, and in such case an appeal in the nature of a writ of error will not lie from the action of the trial judge in sustaining one ground of demurrer directed to only a part of plaintiff's claim and not to the whole declaration, and overruling other grounds of the demurrer to the whole declaration.

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FROM SUMNER.

Appeal in the nature of a writ of error from the Circuit Court of Sumner county.—B. D. BELL, Judge.

W. W. PARBUE and SEAY & SEAY, for Payne.

W. A. GUILD, for Satterfield.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The plaintiff in error sued the defendant in error to recover damages for the deceit alleged to have been practiced by the latter upon the former in the purchase of certain real estate. To the original and amended declarations seven grounds of demurrer were alleged, all of which were overruled except the fourth ground, which was directed to that part of the declaration which sought a recovery for attorney fees incurred by the plaintiff in error in a certain action instituted by a third party against him, seeking to recover commission as real estate agent in and about the sale of the land, with regard to which it is alleged in the declaration the deceit was practiced by the defendant in error. In other words, that ground of demurrer was directed to only a part of the claim of the plaintiff, and not to the whole of his declaration. Both parties, being dissatisfied with the action of the trial judge in disposing of the demurrer, prayed

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and were granted an appeal in the nature of a writ of error. The record thus presents the question of prematurity in the granting of the appeal.

It is a well-settled rule, save where changed by statute, that questions arising in a course of legal proceedings cannot be reviewed in an appellate court until a final decision in the cause has been rendered below. *Evans v. Shields*, 3 Head, 71; *Kendall v. Lassiter*, 68 Ala., 181; *Lester v. Berkowitz*, 125 Ill., 307, 17 N. E., 706; *Pistor v. Hatfield*, 46 N. Y., 249; *Luxton v. North River Bridge Co.*, 147 U. S., 337, 13 Sup. Ct., 356, 37 L. Ed., 194. This rule was designed to avoid the delay and confusion arising from multiplied and successive appeals from interlocutory decisions on matters arising in the progress of the cause before final judgment. It is insisted, however, that there is to be found in section 4889 of Shannon's Code a provision which modifies this rule, so as to remove the objection that the present appeal is premature. That section is as follows: "The chancellor or circuit judge may in his discretion allow an appeal from his decree in equity causes, determining the principle involved and rendering an account for a sale or partition before the account is taken or the sale or partition is made; or he may allow such appeal on overruling a demurrer; or he may allow any party to appeal from a decree which settles his right although the case may not be disposed of as to others."

This section is part of article 7 of chapter 14, which is entitled by Mr. Shannon, in his edition of the Code, "Ap-

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peal from the Circuit and Chancery Court in Equity Cases." Section 4887 of that article provides that either party dissatisfied with the judgment or decree of the circuit or chancery court in a matter of equity, tried according to the forms of the chancery court, may on appeal have a re-examination in the supreme court of the whole matter of law and fact appearing in the record. Section 4888 provides for the trial, upon a demand of either party, of issues of fact in the chancery court. Then follows section 4889, which has just been quoted. We think that the appeal allowed before a final decree provided for in this section is by its terms and by its location in the Code necessarily confined to equity cases tried either in the circuit or chancery court, and that such a case as is the present, involving no equitable principle, is not within the provision of the section, and that the parties thereto are not entitled to its benefit.

In the case at bar there has been no final decision. The court below has determined that one of the claims set up by the plaintiff is not maintainable at law, but has overruled all the other grounds of demurrer, and has thus put the defendant to the necessity of pleading to all the other parts of the declaration. As to these parts the trial judge has held that they alleged good causes of action, with regard to which the plaintiff is entitled to a trial at law.

The case is therefore dismissed from the docket because of the prematurity of the appeal, and it is remanded to the circuit court for further action.

Bank of Winchester v. White.

BANK OF WINCHESTER v. WHITE.

(*Nashville.* December Term, 1904.)

- 1. CHANCERY PLEADING AND PRACTICE.** Defense of outstanding title must be pleaded, when.

A defendant in an action to recover an unpaid balance of purchase money for land bought by him, who also sues by cross bill to recover purchase money already paid, on the ground of a breach of the warranty of title, cannot produce in evidence a deed tending to show an outstanding title superior to that of his vendor, without pleading same. (*Post*, pp. 66-68.)

- 2. RES ADJUDICATA.** Vendor not bound by judgment against vendee, when.

The vendor of land suing for the purchase price is not concluded by a judgment against his vendee in an action of ejectment in which the vendor was not a party and in the defense of which he was not allowed to participate. (*Post*, pp. 64, 65, 74.)

- 3. SUPREME COURT.** Will not remand for amendment of pleadings where justice has been done.

The supreme court will not remand a case in order that additional pleadings may be filed, unless it can see that justice has not been done, and that it would in all probability be done by making the remand. (*Post*, pp. 68-75, and especially 73.)

Code cited and construed: Sec. 4905 (S.); sec. 3889 (M. & V.); sec. 3170 (1858).

Cases cited: *Henderson's Admr. v. King*, 4 Hayw., 94, 98; *Cain v. Kersay*, 4 Yerg., 443; *Garner v. Hewett's Heirs*, 2 Yerg., 498; *Wilson v. Smith*, 5 Yerg., 379; *Stovall v. Bowers*, 10 Humph., 560; *McCandless v. Polk & Walker*, 10 Humph., 617, 618; *Smith v. Carden*, 1 Swan, 28; *Cowan v. Dodd*, 3 Cold., 283, 284; *Grider v. Harbison*, 6 Cold., 208, 214; *Charles v. Taylor*, 1 Heisk., 528; *Saylors v. Saylors*, 3 Heisk., 526; *Stewart v. Glenn*, 3 Heisk.,

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581; Smith v. Hinson, 4 Helsk., 250, 256; Thurman v. Jenkins, 2 Baxt., 429; Fogg v. Union Bank, 4 Baxt., 539, 541; Wood v. Neely, 7 Baxt., 590; Evans v. Thompson, 12 Helsk., 538; McKinley v. Sherry, 2 Lea, 201; McEwen v. Gillespie, 3 Lea, 204; Puckett v. Richardson, 6 Lea, 64; Settle v. Marlow, 12 Lea, 472, 474, 475; Smith v. Carter, 16 Lea, 527; Bank of Jamaica v. Jefferson, 92 Tenn., 537, 542; Bond v. Montague, 97 Tenn., 727; Anderson Co. v. Hays, 99 Tenn., 542, 567; Mfg. Co. v. Weatherly, 101 Tenn., 318, 322; Schilling v. Darmody, 102 Tenn., 439, 449, 450; Sully v. Childress, 106 Tenn., 103, 120; Sawyers v. Sawyers, 106 Tenn., 597, 605, 606; Caesar v. Harris, 108 Tenn., 653.

4. SAME. Same. Will not remand for additional pleadings if party asking is guilty of culpable negligence.

The supreme court will not remand a case in order that additional pleadings may be filed, if the party seeking the remandment has been guilty of culpable negligence. (*Post*, pp. 70-75.) See Code, and cases cited under headnote 3.

FROM FRANKLIN.

Appeal from Chancery Court of Franklin County.—
T. M. McCONNELL, Chancellor.

JAMES TAYLOR, T. A. EMBREY and LYNCH & LYNCH,
for Bank.

GEORGE E. BANKS, for White.

MR. JUSTICE NEIL delivered the opinion of the Court.

The facts out of which the question for decision arises are as follows:

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Some years ago the complainant sold to the defendant a track of 2,000 acres of land lying in the mountains of Franklin county at \$3,000, \$1,500 of which was paid in cash, and for the balance a promissory note of \$1,500 was executed. After this time White was sued in ejectment by R. A. Alger, and the land was recovered from him. The complainant in the present case was not notified by White to take charge of the litigation so as to protect itself upon its warranty, and in fact was not permitted by White to do so. It craved of White, after the decree was entered against him, the privilege of prosecuting an appeal to this court in the name of White, offering to protect him against the costs; but White would not agree to this. Subsequently, with a view to protecting itself, the bank attempted to prosecute a bill of review for the purpose of reviewing the judgment obtained in that case, but the court held he was not in a position to maintain such a bill, not being a party to the record.

It should also be stated that pending the proceedings in the Alger case the bank offered to take a reconveyance of the land from White, and to return to him the money he had paid, but White declined this proposition.

Pending the proceedings in the Alger case the bill in the present case was filed by the bank to collect the balance of the purchase money. Thereupon a cross bill was filed by White to recover of the bank the \$1,500 previously paid to it, and interest thereon; the ground of action stated in the cross bill being that the bank had war-

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ranted the title to the land, and the title had failed by reason of the recovery in the Alger case. In the answer to the cross bill the bank set up as a defense the facts above stated with reference to its efforts to protect itself in the litigation with Alger, in which the land had been lost, and the further fact that the title which it had conveyed to White was older than the Alger title, and that the ground on which Alger recovered the land was untrue in fact; that is, that Alger had been enabled to recover through proof of seven years' adverse possession, when in fact "the possessions" under which this claim was based did not rest upon the land at all, but upon another and different tract; and that White had lost the suit through his own negligence.

The chancellor rendered a decree against the complainant in the original bill and in favor of the cross-complainant, holding that complainant was bound by the proceedings in the Alger case, and should not be permitted to prove that the supposed Alger possessions did not in fact exist. On appeal to this court at a former term it was held that complainant bank was not bound by the proceedings in the Alger case, the decree of the chancellor was reversed, and the cause was remanded to allow complainant to introduce the evidence referred to, and for further proceedings.

When the case again reached the chancery court, the complainant fully proved that its title was the older, and that Alger never had possession of the land. The cross

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complainant, White, then, instead of renewing the litigation on the lines laid down in the pleadings above recited, introduced evidence of a deed made to one Taul, which on its face, when taken in connection with the chain of title under which the complainant claimed, purported to be superior to the complainant's title. The cross complainant, however, filed no additional pleadings, hence there were no pleadings which would justify the introduction of the before mentioned deed in evidence. Objection was made by the complainant in the court below to the introduction of this deed on the ground that there were no pleadings to justify it; but this objection was overruled by the chancellor, and the deed admitted. The purpose of introducing the deed was, of course, to show that the complainant had no title to the land which it had sold to the defendant and cross complainant; hence that there was no consideration for the note which White had executed to it, and that he had got nothing for the money which he had paid to it.

The chancellor decreed in favor of White, but on appeal to this court the cause was referred to the court of chancery appeals, and in that court the decree was reversed. However, the court of chancery appeals declined to render a decree in favor of the bank for the balance of the purchase money due, but directed that the cause should be remanded to the chancery court of Franklin county, to the end that proper pleadings might be filed which would justify the introduction of the deed. The ground of the action of the court of chancery appeals in

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making the remand was that in its opinion justice required such course in order that the rights of the parties might be correctly determined. The court of chancery appeals, however, found, as it seems, that under the deed of the complainant bank there had been seven years' adverse possession as against the title of Taul or the heirs of Taul; or at least strong grounds for so believing are stated in the opinion of this court.

There can be no doubt of course, that the decree of the court of chancery appeals was correct, in so far as it denied any relief to White by reason of the Taul deed, or as based on that deed, for the reason that there were no pleadings under which that deed could be introduced.

In the assignment of errors filed in this court by the complainant several grounds are laid on which to base the conclusion that the Taul deed was not a valid deed. This deed is on record in the register's office of Franklin county, and purports to have been made upwards of sixty years ago. It does not appear that either Taul or his heirs ever recognized the deed, or claimed under it, or claimed the land in any way. It does appear that George Gray, the alleged vendor of Taul, at his death devised this land to his son, under whom the bank purchased. It is probable that, if the Taul deed was ever a real conveyance, it was long ago cancelled or rescinded by the parties; otherwise it is not probable that George Gray would have attempted to devise it. However we shall, for the purpose of the discussion which follows, assume that the Taul deed was a valid deed at its incep-

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tion, and that it has never been cancelled. From this standpoint we shall state the question which we regard as decisive of the case.

The question for determination is whether the court of chancery appeals acted correctly in remanding the case with leave to White to file additional pleadings.

In order to properly dispose of this matter, we have deemed it advisable to re-examine all of our authorities bearing upon the subject, and have done so.

We have a statute which regulates the practice, Shannon's Code section 4905 (Code 1858, section 3170), and numerous decisions construing this section.

We have also several cases which were decided by the court before the enactment of the Code of 1858, with which the above section originated.

These prior cases are *Henderson's Adm'r v. King*, 4 Hayw., 94, 98; *Cain v. Kersay*, 1 Yerg., 443; *Garner v. Hewet's Heirs*, 2 Yerg., 498; *Wilson v. Smith*, 5 Yerg., 379; *Stovall v. Bowers*, 10 Humph., 560; *McCandless v. Polk & Walker*, 10 Humph., 617, 621; *Smyth v. Carden*, 1 Swan, 28.

The cases since the enactment of the section of the Code above referred to are as follows: *Cowan v. Dodd*, 3 Cold., 283, 284; *Grider v. Harbison*, 6 Cold., 208, 214; *Charles v. Taylor*, 1 Heisk., 528; *Saylors v. Saylors*, 3 Heisk., 526; *Stewart v. Glenn*, 3 Heisk., 581; *Smith v. Hinson*, 4 Heisk., 250, 256; *Thurman v. Jenkins*, 2 Baxt., 429; *Fogg v. Union Bank*, 4 Baxt., 539, 541; *Wood v. Neely*, 7 Baxt., 590; *Evans v. Thompson*, 12

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Heisk., 538; *McKinley v. Sherry*, 2 Lea, 201; *McEwen v. Gillespie*, 3 Lea, 204; *Puckett v. Richardson*, 6 Lea, 64; *Settle v. Marlow*, 12 Lea, 472, 474, 475; *Smith v. Carter*, 16 Lea, 527; *Bank of Jamaica v. Jefferson*, 92 Tenn., 537, 542, 22 S. W., 211, 36 Am. St. Rep., 100; *Bond v. Montague*, 97 Tenn., 727, 37 S. W., 699; *Anderson Co. v. Hays*, 99 Tenn., 542, 567, 42 S. W., 266; *Mfg. Co. v. Weatherly*, 101 Tenn., 318, 322, 47 S. W., 432; *Schilling v. Darmody*, 102 Tenn., 439, 449, 450, 52 S. W., 291, 73 Am. St. Rep., 892; *Sully v. Childress*, 106 Tenn., 109, 120, 60 S. W., 499, 82 Am. St. Rep., 875; *Sawyers v. Sawyers*, 106 Tenn., 597, 605, 606, 61 S. W., 1022; *Caesar v. Harris*, 108 Tenn., 653, 69 S. W., 731.

The section of the Code referred to reads as follows:

"The court shall also, in all cases, where, in its opinion complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight, without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the object of the order, and upon such terms as may be deemed right."

Most of the decisions before the Code (*Henderson v. King*, *Wilson v. Smith*, *Stovall v. Bowers*, *McCandless v. Polk & Walker*) and some of the cases decided since the Code (*Cowan v. Dodd*, *Grider v. Harbison*, *Charles v. Taylor*, *Saylors v. Saylors*, *Stewart v. Glenn*, *Smith v. Hinson*, *Evans v. Thompson*), seem to lay down the doctrine broadly that the court will remand for the purpose of filing new pleadings or making additional proof where

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it can be seen that justice has not been done as the case stands, or that such new pleadings and evidence are necessary for the purpose of effecting justice. These cases do not seem to qualify the duty referred to by any consideration of negligence on the part of the person to be benefited by such remand. However, nothing is said in either of the cases just referred to that would justify the statement that any serious negligence could be overlooked.

In two of the earlier cases (*Cain v. Kersay* and *Garner v. Hewet's Heirs*), the rule is recognized that there should be no remand if there has been a culpable negligence on the part of the person applying therefor. In several of the later cases (*Fogg v. Union Bank*, *McEwen v. Gillespie*, *Anderson Co. v. Hays*, *Mfg. Co. v. Weatherly*, *Schilling v. Darmody*) this point has been emphasized.

It is not essential that we should consider separately each of the authorities referred to in this opinion, but it will be found useful, as we think, to refer to a few instances where the court has deemed the oversight not a culpable one, and to others in which it has adjudged that the negligence was culpable. In *Wood v. Neely*, the case was remanded to enable the party to prove that a certain instrument of writing in his possession, the basis of the suit, had been assigned to him. There was no controversy in the court below on the subject of the assignment, and the testimony, while necessary, was in the nature of formal evidence. In *Settle v. Marlow*, the

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oversight consisted in failing to prove that a person was dead whose death was assumed by the party because apparently notorious. In *Smith v. Carter*, the oversight consisted in failing to prove the value of a certain lot claimed as homestead. In *Bank of Jamaica v. Jefferson*, the oversight was in the failure to prove the formal fact of the corporate existence of the complainant. In *Sawyers v. Sawyers*, it appeared that the court and counsel in the trial below had both erroneously assumed that the answer of one of the defendants was evidence against another. A remand was allowed, in order that proof might be made covering the point for which the parties had previously depended upon the answer. In *Caesar v. Harris*, it appeared that the chief controversy in the case was over the validity of a tax sale, but in the course of the litigation it became necessary for one of the parties to rely upon a certain deed not arising in the main contest. He asked leave in the court below to prove this deed, but this was denied him. This court held that the oversight was not culpable, in view of the fact that the attention of the parties was directed to the main contest. In all of the foregoing cases just cited the court was able to see that, with the missing testimony in, the party desiring it would be successful, and that justice would be subserved by the remand.

We shall now refer to some of the cases wherein the court held that by reason of culpable negligence the remand should be denied. In *Cain v. Kersay* the demand was refused because the defect was such as might have

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been corrected in the court below by simply asking for an amendment. In *Garner v. Hewet's Heirs* the court pointedly referred to the fact that the case had once before been remanded for failure on the part of the complainant to put in certain pleadings. Speaking to the subject, the court said: "It is moved that this cause be remanded to said chancery court for further proofs. We are unhesitatingly of the opinion that this ought not to be done. Without the evidence which it is confessed is wanting, the complainant has failed in making out a case for the interference of this court. The practice insisted on would, in effect, make the hearing in the chancery court an experiment. We will not say that no case could arise where this court would remand a cause; but certainly, to justify it, the case must be one where it would be apparent that great injury would result from a denial of a motion like the present. This cause has been once remanded, and that for a failure on the part of the complainant in not putting in his replications to the answers," etc.

In *Fogg v. Union Bank* the remand was denied on the ground that the facts existed and were in the knowledge of the parties at the time the bill was filed; that a demurrer had called attention to the want of the very allegations of fact subsequently sought to be availed of by the remand; and that the litigation had been long pending. Moreover, the court said that it could not see, from the record, that justice had not been done.

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In *McEwen v. Gillespie* the remand was denied on substantially the same grounds stated in the last case, with the exception that it did not appear in this case that the litigation had been long pending.

In *Anderson Co. v. Hays* the remand was denied because it appeared the party had had full opportunity to make the proof desired, and failed to do so, and the court could see that justice had been done as far as possible, in view of the complicated condition of the accounts of the defendant.

In *Mfg. Co. v. Weatherly* the remand was refused because the party had had ample time to make proof of the facts of which he now sought to avail himself by the remand.

In *Schilling v. Darmody* the remand was refused on the same grounds.

The controlling principle in every case is that, in order to justify the court in making the remand, it must be able to see that justice has not been done, and that it would in all probability be done by making the remand. This point is brought out clearly in *Evans v. Thompson*, *Smith v. Carter*, *Bond v. Montague*, *Sully v. Childress*, and *Caesar v. Harris*, as well as in several of the other cases cited.

In considering the cases decided before the Code and comparing them with the section of the Code above copied, it is clear that the latter was but a formulation of the rule contained in all of such prior cases when examined in relation to each other, and that the cases since

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the Code section was passed, while now emphasizing the point that the court must be able to see that justice has not been done, and now emphasizing the point that there must be no culpable negligence, yet are but broader statements of the contents of the Code section. Their chief use, in respect of the point now under examination, is to illustrate the meaning of the term "culpable negligence" contained in the statute by showing examples of such culpable negligence and instances not held to amount to such negligence.

We shall now apply the foregoing observations, as far as may be necessary, to the case before the court.

In the first place, we are not able to see from the record, as it now stands, that justice has not been done to the cross complainant and defendant White. His action in respect of the Alger case, his failure to call on the bank to conduct that litigation, and, subsequently, his refusal to permit the bank to appeal in his name on securing him against costs, and his refusal to accept a rescission pending the controversy with Alger, do not commend him to the favorable consideration of the court. These circumstances, combined, seem to indicate the existence of bad faith on the part of White, although its nature is not fully disclosed, and can only be surmised.

Again, the court of chancery appeals find that in all probability the Taul title has been destroyed by adverse possession. It is true that the language of the court of chancery appeals is somewhat indeterminate, in that Judge Wilson of that court uses the expression that

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there was evidence "tending to show" thus and thus; but, reading the whole passage, and noting that he does not state that there was any proof tending to show the contrary, it seems that the court of chancery appeals intended the statement referred to as a finding of fact. In addition to the foregoing, it seems probable that the Taul title would have continued to sleep, as it has slept for more than sixty years, if it had not been discovered and restored to activity by Mr. White. It is more than probable that, if his defense against the Alger claim had been fully presented, that claim would have been defeated. He (White) would have kept the land, and the Taul title would never have been heard of. So, as already stated, we cannot see, on the record as it stands, that any injustice had been done to Mr. White.

In addition to the foregoing, we think it was culpable negligence, in the sense of the statute, that Mr. White did not file some additional pleadings covering the point presented by the Taul deed, especially in view of the fact that his attention was called to the point by an exception to the evidence, based on this very ground. Furthermore, the litigation has been long pending, and it should at some time be brought to an end.

In view of the foregoing considerations we are of opinion that the court of chancery appeals erred in remanding the cause. We are further of the opinion that a decree should be entered here for the amount of complainant's debt and interest, with the costs of the cause.

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STATE v. FRANKGOS *et al.*

(Nashville. December Term, 1904.)

1. **SCIRE FACIAS.** Immaterial omission in writ.

A *scire facias*, requiring the sureties upon a forfeited recognizance in a felony case to appear and show cause why judgment final should not be taken against them, will not be quashed because of the omission of the words "in the name of the State" from the commanding part of the writ addressed to the sheriff.

Act cited and construed; 1897, ch. 47.

2. **SAME.** May issue against sureties alone.

A recognizance, with sureties, for the appearance of a defendant in a felony case is a joint and several obligation, and a *scire facias* thereon may issue against the sureties alone, without the principal.

Code cited and construed: Sec. 4484 (S.); sec. 3484 (M. & V.); sec. 2787 (1858).

Cases cited and approved: *Brewer v. State*, 6 Lea, 199; *Davis v. Davis*, 5 Lea, 182.

3. **EXONERATION OF BAIL.** Not without surrender of principal, when.

In order to entitle the sureties on a forfeited bail bond to relief under sec. 5180 of the Code (Shan., sec. 7144), it is imperatively required that the body of their principal be produced in court, and under that section no relief can be had without the surrender of the defendant.

Code cited and construed: secs. 5180, 5181 (1858); secs. 6010, 6011 (M. & V.); secs. 7144, 7145 (S.).

4. **SAME.** Not granted by court except in extreme cases.

The power vested in the court by secs. 5182, 5183 of the Code (Shan., secs. 7146, 7147), to relieve against a forfeited recog-

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nizance, is to be exercised only in extreme cases, and was not intended to authorize courts to relieve sureties upon bonds and recognizances of parties charged with crime, who have made default and are still at large, merely because the sureties have, in good faith and at much expense, made unavailing efforts to recapture their principal.

Code cited and construed: Secs. 5182, 5183 (1858); secs. 6012, 6013 (M. & V.); secs. 7146, 7147 (S.).

FROM DAVIDSON.

Appeal from Criminal Court of Davidson County.—
W. M. HART, Judge.

J. M. ANDERSON and W. D. COVINGTON, for Jackson
& Boyd, Sureties.

ATTORNEY-GENERAL CATES, for the State.

MR. JUSTICE SHIELDS delivered the opinion of the
Court.

George Frankgos was indicted for a felony in the criminal court of Davidson county at the November term, 1902, arrested December 16, 1902, and entered into recognizance in the penalty of \$2,500, with George E. Jackson and R. F. Boyd as sureties, for his appearance at the next January term of that court.

When the case was regularly reached upon the docket at that term, February 18, 1903, Frankgos was called, but came not, and made default, and thereupon forfei-

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ture was taken upon his recognizance, judgment *nisi* entered against his sureties, and *scire facias* awarded, requiring them to appear at the succeeding term and show cause, if any they had, why final judgment should not go against them. The *scire facias* was duly served upon the sureties, and they appeared and made defense December 14, 1903, and moved to quash the writ upon the ground that it did not conform to the provisions of chapter 47, page 183, of the Acts of 1897, providing a form for *scire facias* in such cases, and because the defendant Frankgos was not included in the writ, which motion was overruled.

Thereupon Jackson and Boyd filed a petition, averring therein that, upon learning of the default of their principal, Frankgos, they had offered a reward of \$200 for his arrest, and issued a circular, containing an accurate description and a photograph of Frankgos, and announcing the reward, to the chief of police of every important city and the sheriff of every county in every State of the United States, and had sent special agents and detectives to all places where they had any probable ground to believe that he was hiding, for the purpose of finding and arresting him, and in other ways had, in good faith, made every effort possible to locate and arrest their principal and have him forthcoming in compliance with the terms of the recognizance, but without success; and praying that upon these facts the court exercise the power and discretion conferred upon it by statute (Code, secs. 5180-5183; Shannon's Code, secs.

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7144-7147), and relieve them from the penalty of the bond upon payment of costs.

The case was heard upon this petition, the averments of which were admitted to be true, relief denied, and judgment final entered.

They have brought the case to this court, and assigned errors.

The first ground of the motion to quash the *scire facias* is predicated upon the failure of the writ to recite, as in the form provided by chapter 47, page 183, of the Acts of 1897, "in the name of the State," in the commanding part, addressed to the sheriff. There is no merit in this point. The statute only requires the writ to be substantially in the form therein set out. This one is issued and runs in the name of the State, and contains every material statement in the form prescribed. It commands the sheriff of Davidson county to notify George E. Jackson and R. F. Boyd that a conditional judgment had been rendered against them in the case of *State v. George Frankgos* at the January term, 1903, of the criminal court of Davidson county, for the sum of \$2,500 and costs, upon a recognizance of the defendant and themselves as his sureties, and that said judgment would be made final unless they appeared at the next term of said court and showed cause why it should not be done. This complies fully with the statute, and gives the defendants notice of every fact necessary to enable them to make all defenses they may have to a final judgment.

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The form of the *scire facias* provided by the act of 1897 was intended to obviate the technical objections that have heretofore been made and sustained to proceedings to enforce bonds and recognizances for the appearance of defendants in criminal cases, by providing that a plain and simple notice of the default and forfeiture, and the time when the sureties are to appear and show cause why judgment final should not be entered against them, shall be sufficient for that purpose; being considered by the general assembly necessary for a more efficient and vigorous enforcement of the criminal law. This is a wholesome statute, and it is the duty of the courts to enforce it according to its spirit.

The other ground of the motion is that the *scire facias* was not issued against Frankgos, but the sureties alone. There is nothing in this. All bonds and recognizances are joint and several, and may be enforced against all or a part of the obligors. Shannon's Code, sec. 4484; *Brewer v. State*, 6 Lea, 199, 203; *Davis v. Davis*, 5 Lea, 182.

The sections of the Code under which the relief prayed in the petition is asked are as follows:

"5180. Exoneration of bail. After the liability of the bail has become fixed by forfeiture, and before payment, they may be exonerated from the liability by the surrender of the defendant and the payment of all costs; but may be exonerated from costs also, if, in the opinion of the court, they have been in no fault.

"5181. Discretionary with court. But it is left to

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the sound discretion of the court whether they shall be relieved from the liability of bail to any and to what extent.

"5182. Petition for relief on forfeiture—Proceedings. The judges of the circuit and criminal courts may receive, hear, and determine the petition of any person who may conceive that he merits relief on any recognizance forfeited, and so lessen or absolutely remit the same, and do all and everything therein as they shall deem just and right, and consistent with the welfare of the State, as well as the person praying such relief.

"5183. After judgment. This power shall extend to the relief of those against whom final judgment has been entered, as well as to the relief of those against whom proceedings are in progress."

It is clear that this case does not come within section 5180, because the bail have not produced in court the body of their principal. This is imperatively required by this section, and under it no relief can be had without the surrender of the defendant.

Nor do we think a case is made for relief under section 5182. This section is somewhat vague in its terms, and does not provide what must be done in order to entitle the petitioner to relief. We think, however, that, under the most liberal construction that can be given it, the power vested in the court is to be exercised only in extreme cases, such as where the sureties cannot pro-

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duce their principal in court on account of his death, or some other condition of affairs, if any can exist, which make it equally impossible for them to surrender him. It certainly was not intended to authorize courts to relieve sureties upon bonds and recognizances of parties charged with crime, who had made default and were still at large, merely because the sureties had, in good faith, and at much expense, made unavailing efforts to recapture them. These obligations are not mere idle forms, but are required and made for the purposes expressed in them. Good faith is not involved. The sureties knowingly and absolutely contract that their principal shall be present at the time in the obligation stated, to answer the State upon the charge preferred against him; and, if they fail to do so, they must comply with the terms of the bond or recognizance. A wise and sound public policy requires a rigid enforcement of these bonds when breached.

It is true that in bailable cases it is to the interest of the State that defendants give bail for their appearance, and that the object of the bond is to secure the appearance of the defendant, and not for the purpose of covering the penalty into the treasury of the State; but it is more important that the party charged with crime be forthcoming for trial, than that the expense of keeping him in prison be avoided, and his appearance can only be made certain by enforcing payment of bonds and recognizances when default is made. To relieve sureties upon the grounds here asked would encourage de-

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fendants to forfeit their bail, and bring about a very lax administration of the criminal laws of the State. Relief may be granted under section 5183 after final judgment, and thus until payment the sureties have an inducement to continue their efforts to apprehend the fugitive. The defendants in this case were bond brokers, and received a consideration of \$100 for becoming bail for Frankgos, but what is here said also applies to parties who receive no consideration for the liability assumed by them.

There is no error in the record, and the judgment is affirmed, with costs.

Railroad v. Sawyer.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. JOHN H.
SAWYER.*(Nashville. December Term, 1904.)*

RAILROADS. Warning of approach of trains at overhead crossings when danger is to be reasonably apprehended.

Where a public road is crossed by a railroad on an overhead bridge, no absolute duty rests upon the railroad company, either at common law or by statute, to give reasonable warning to travelers on the highway of the approach of a train by the usual signals; but, if the place is dangerous, the company must warn travelers on the highway of the approach of its trains; and whether the place, as a matter of fact, is dangerous, is a question for the determination of the jury; and in the event the jury should find that danger was to be reasonably apprehended at the conjunction of the underpass and overhead bridge, then, as a matter of law, it was the duty of the railroad company to give warning of the approach of its trains.

Cases cited and approved: Railroad v. Barnett, 59 Pa., 259, 263; Rupard v. Railroad, 88 Ky., 280; Railroad v. Dillon, 123 Ill., 750; Pennsylvania Co. v. Krick, 47 Ind., 386; Winstanley v. Railroad, 72 Wis., 375; Railroad v. Hamilton, 44 Ind., 76; People v. Railroad, 13 N. Y., 78.

Cases cited, distinguished, and disapproved: Favor v. Railroad, 114 Mass., 350; Ryan v. Railroad, 132 Pa., 304; Ransom v. Railroad, 62 Wis., 178; Jenson v. Railroad, 57 N. W., 359, 22 L. R. A., 680; Farley v. Harris (Pa.), 40 Atl., 798.

FROM WILLIAMSON.

Appeal from the Circuit Court of Williamson County.
—J. A. CARTWRIGHT, Judge.

Railroad v. Sawyer.

JOHN BELL KEEBLE, C. R. BERRY and HENDERSON & HENDERSON, for Railroad.

HEARN, MCCORKLE & LANE, for Sawyer.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The defendant in error, Sawyer, recovered a verdict and judgment against the company for the sum of \$1,300 damages for personal injuries. The company appealed, and has assigned errors.

The gravamen of the action, as alleged in the declaration, is that Sawyer was driving in a buggy along a turnpike road, and, when about to pass under the overhead trestle of the company, a train of cars rapidly came upon the tracks, frightening plaintiff's horse, overturning the buggy, and throwing plaintiff to the ground, as the result of which he sustained serious personal injuries. The theory of the plaintiff below was that this was a dangerous crossing, and the company was guilty of negligence in not warning the public of an approaching train.

The declaration comprises five counts, but the substance of the complaint, as alleged in the first count, is:

"Said defendant, Louisville & Nashville Railroad Company, through and by its agents and servants, did carelessly, wantonly, negligently, and wrongfully, and without notice or warning to plaintiff, run, drive, and propel one of its said engines and trains of cars up to,

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upon, over, and across said overhead bridge, directly over and above said line of pike road upon which plaintiff was traveling in the way and manner aforesaid, on account of which careless, wanton, negligent and wrongful act of defendant railroad company, the horse which plaintiff was driving became frightened," etc.

There is no complaint, either in the declaration or proof, that the horse was frightened in consequence of any excessive or unusual whistling or ringing of the bell or escaping of steam, which is usually the foundation of such actions, as illustrated by the case of *Mitchell v. Railroad*, 100 Tenn., 329, 45 S. W., 337, 40 L. R. A., 426.

But it is conceded that the train approached this overhead bridge under which the plaintiff was about to pass almost noiselessly.

The complaint in this declaration is that it was the legal duty of the railroad company to warn travelers upon the highway about to pass under the railroad track, of the approach of the train, and the failure of the company to perform this duty was the proximate cause of the accident.

There is proof tending to show that at the *locus in quo* of the accident the Louisville & Nashville Railroad crosses the Franklin & Nolensville Turnpike by means of an overhead trestle, resting upon massive rock walls, which project out on either side of the railroad, forming a narrow and restricted passageway under the railroad. The view of the approaching train was to some

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extent obstructed by houses, walls, hedges, etc.; and, though plaintiff was looking and listening for any train that might be coming from either direction, he neither saw nor heard the approaching train until about to start under the overhead bridge, when this train, running at the rate of about forty miles an hour, suddenly appeared and passed over said trestle while plaintiff was passing under it, or just as he emerged from it on the eastern side. As a result thereof, plaintiff's horse became frightened, throwing plaintiff from the buggy to the ground, breaking his collar bone, and inflicting other serious personal injuries.

There is proof tending to show that, as a consequence of the fracture of plaintiff's collar bone, a knot or malformation had appeared on that part of his breast and shoulder where said collar bone was broken. According to the proof, the whistle was not sounded, nor the bell rung, as the train approached this overhead crossing. It is insisted that the company was under no obligation to ring the bell or sound the whistle at this point in obedience to the requirements of the statute, since the obstruction was not upon the track of the company, but beneath it.

The theory of the plaintiff is that the company was under a common-law duty to sound the whistle on approaching a public highway extending under the railroad trestle, and which crossing, by reason of the topography of the country and the surrounding environment,

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was dangerous to the public traveling along the highway.

On the other hand, it is insisted on behalf of the company there is no common-law obligation on a railroad company to sound signals at an underpass, and no liability for any injury resulting from the frightening of a horse by the lawful and reasonable operation of a train over an underpass. The company therefore assigns as error the following instruction of the trial judge on this subject, viz.:

"It was the duty of the defendant company to give plaintiff reasonable warning of the approach of its trains, by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track. If you believe from the evidence in this case that the plaintiff, on approaching the overhead bridge, was in the exercise of due care and caution, as defined to you above, and while passing under the overhead bridge the defendant's train ran over the bridge, having given plaintiff no reasonable warning of the approach in the usual way, by ringing the bell or blowing the whistle, and if the noise of the sudden approaching train passing over the road scared the plaintiff's horse and caused him to run away, throwing the plaintiff out of his buggy, and if the negligence of the defendant, through its servants or agents, by failing to give such warning, was the proximate cause (that is, the direct and efficient cause) of his injuries, without which his injuries would not have occurred, then the defendant

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company is liable, and your verdict should be for the plaintiff."

It is conceded by counsel on both sides that the question thus presented by the charge of the trial judge is one of first impression in this State. It is conceded by counsel for the company that, under the authorities, if this were a grade crossing, the company would be onerated with some common-law duty to warn travelers of its approach, but it is contended that no such duty applies when the traveler is not compelled to pass over the railroad track, but beneath it.

As illustrating the position of counsel for the company, the case of *Favor v. Boston, etc., R. Co.*, 114 Mass., 350, 19 Am. Rep., 364, is cited, in which the court used this language, viz.:

"Where a railroad crosses a highway at grade, the law imposes upon it the duty of giving notice to travelers of the approach of its trains. This rule applies because at grade crossings the traveler on the highway and the railroad enjoy a common privilege on the highway itself, and each must use such privilege with due regard to the safety and rights of the other. And as a train of cars is a dangerous power when in motion, and capable of doing great injury, a high degree of care is demanded of the railroad in controlling it, and some notice of its approach to the highway is required both by the rules of the common law and by statute. But where a railroad crosses a highway by a bridge, it does not, in common with the traveler, have any privilege in

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or use of the highway itself. Though the track and the highway are near and adjacent to each other, they are entirely distinct and separate. The railroad has no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveler. It has the right to use its roadbed and bridge as a railroad may use them—by running its trains at the common rate of speed, accompanied by the usual noises attendant upon such exercise of its rights. It is not bound by law to notify the traveler of its intention to use its bridge in the ordinary and usual manner.”

In *Ryan et ux. v. Pa. R. Co.*, 132 Pa., 304, 19 Atl., 81, it appeared that plaintiffs were driving under defendant's railroad upon a public street, when a train crossing overhead frightened their horse so that it became unmanageable and ran away, inflicting serious personal injuries, and resulting in the death of one of the children. The court said:

“The defendant company was operating its road in a lawful manner. No defect was shown in the construction of the road. On the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorizing it. The sight and sound of a moving train always have a tendency to frighten horses. In this case the fright was occasioned by sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which

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may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The defendant company has, under all the authorities, the right to operate its road in a lawful manner; and, when it does so without negligence and without malice, is not responsible for injuries occasioned thereby."

In *Ransom v. Chicago Railway*, 62 Wis., 178, 22 N. W., 147, 51 Am. Rep., 718, liability was adjudged against the company for breach of a statute of that State requiring certain precautions to be observed by railroad companies before crossing any highway; causing a horse to run away near a crossing, and inflicting personal injuries on plaintiff's wife. The court said:

"There is no statute, and we are aware of no common-law rule, which, under such circumstances, requires railroad companies to observe these precautions to avoid accident. If, therefore, the defendant is liable in this action, it is so because it failed to comply with the requirements of the statute prescribing its duty when its train approached the crossing of the highway."

In *Jenson v. Chicago, etc., Railroad Company*, 57 N. W., 359, 22 L. R. A., 680, the court said as follows:

"It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some horses going under the bridge, or being near it at the same time, might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make

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less noise going over slowly than faster. What degree of noise must it make, to frighten horses? . . . As to ringing the bell and blowing the whistle, they are only required, if at all in order to avoid frightening horses, and, with that view, to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on and take his chances, for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage."

The cases just mentioned comprise all those cited by counsel for the company in support of their contention that the charge of the circuit judge was erroneous. The authorities holding the contrary doctrine will now be considered. Rapalje & Mack, in their Digest of Railway Law, volume 3, section 92, state the law thus:

"Independently of the statute, it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger." Citing *Chicago & A. R. Co. v. Dillon*, 123 Ill., 750, 15 N. E., 181, 5 Am. St. Rep., 559; *Pa. Co. v. Krick*, 47 Ind., 386; *Winstanley v. Chicago, M. & St. P. R. Co.*, 72 Wis., 375, 39 N. W., 856.

"The absence of a statute requiring the ringing of a bell or the sounding of a whistle in approaching highway crossings will not excuse the company for a failure to do so under all circumstances. Where a view of ap-

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proaching trains is obstructed, or it is impossible or very difficult to hear them, and in similar cases, it is clearly the duty of the company to give such signals, although not required by the statute." Citing authorities.

"Whether in a given case, ordinary care requires the giving of such signals, is a question for the jury." Citing *Indianapolis R. Co. v. Hamilton*, 44 Ind., 76.

Again, the same author, at section 97, volume 3, says:

"Where the view of an approaching train is obstructed, though the company is not required by the statute to sound a whistle or ring a bell when its train approaches a highway, yet, where such appliances are available, the failure to use them is negligence." Citing cases.

"Where an approaching engine is concealed from the view of persons approaching a highway crossing at a place of much travel, regardless of the statute, the duty of the company to operate its train at a moderate rate of speed, and to give the usual signals of its approach, is more imperative than at a place of less danger." Citing authorities.

Again, the same author, at section 154, volume 3, says:

"The provision of the New York act of 1850, section 39 (page 232, c. 140), prescribing a penalty for running a locomotive past highway crossings without giving signals, applies to a crossing where the track is carried

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over the highway on a bridge." Citing *People v. N. Y. Central R. Co.*, 13 N. Y., 78, affirming 25 Barb., 199.

"It is as much the duty of a company to give notice of the approach of trains where highways pass under or over the track as where they cross at grade, if danger is likely to result to persons or property from a failure to do so." Citing *Pennsylvania R. Co. v. Barnett*, 59 Pa., 259, 98 Am. Dec., 346.

This latter case seems to be the leading authority relied on by counsel for the plaintiff below, and we shall therefore proceed to notice it *in extenso*.

The facts of that case are that the public road crossed the railroad by a bridge nineteen feet above the track. The plaintiff was traveling along this road, and while driving over the bridge an express passenger train passed under it, whistling as it passed, at which his horse took fright and ran away, overturning the carriage and throwing plaintiff out, in consequence of which he was seriously and permanently injured. It appeared that a mill on the east side of the public road obstructed the view of the railroad to some extent. About one hundred rods east of the bridge there was a whistling post, and it was usual for trains going west to sound an alarm whistle as they passed, but at the time of the accident the whistle was not sounded until the train was passing under the bridge. The court, in the midst of its opinion, said:

"The degree of care demanded of the company in running its train depended on circumstances, and

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whether it observed due care in approaching the bridge, or was guilty of negligence in not sounding an alarm whistle, was a question which properly belonged to the jury to determine. . . . If there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning in order that it might be avoided. . . . Whether, therefore, the company exercised proper care and diligence in running the train in order to prevent injury to the persons and property of those who were lawfully on the public road and in the vicinity of the crossing, was a question for the jury."

It was further insisted in that case that the company would not be liable for failing to sound the alarm whistle except at points on the road where injury might result to persons on the track at road crossings at grade and stations. The court held that whether it is the duty of the company to give notice of the approach of its trains at any point on the road depends altogether upon circumstances. Where there is no reasonable apprehension of danger, no such notice is required. But if danger to the person or property of others may be reasonably apprehended or is likely to result from the running of its trains without giving such notice, then it is the duty of the company to give it, and its omission

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is negligence. The court approved the charge of the circuit judge in saying that it was the duty of the company to give notice wherever danger may result to persons rightfully traveling on a public road that crosses the track, whether at grade, or over or under the railroad, where danger would be the consequence of want of notice.

It will be observed that the substance of this opinion is that, whether or not it was negligence on the part of the company to fail to warn travelers of the approach of the train to a public crossing, was a question for the determination of the jury, in view of all the surrounding circumstances, and it was immaterial whether the railroad crossed the public road at a grade, or over or under the public road.

Another case very much relied on by counsel for plaintiff below is *Rupard v. Ches. & O. R. Co.*, decided in 1889 by the court of appeals of the State of Kentucky, and reported in 88 Ky., 280, 11 S. W., 70, and in 7 L. R. A., 316. In that case it appeared that the wife of plaintiff, while riding horseback on the public road at a point where the railroad crosses said road on a high trestle, was thrown from her horse in consequence of his fright from the noise of the train as it passed over the trestle. The ground of liability asserted in that case was the failure of the company to give notice of the approach of the train to the crossing. The court, in considering the liability of the company, repudiated the doctrine laid down in *Favor v. Boston R. Co.*, *supra*, in

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which a distinction was drawn between the duty of the company to warn travelers of the approach of a train to an overhead bridge or to a grade crossing. In the Kentucky case the court held that it is the duty of a railroad company, where a train crosses a public highway on a trestle, and there is danger of catching a traveler thereunder unawares, and frightening the horse that he is riding or driving, to give some timely warning of the approach of the train to the crossing. The court, in its opinion, while disagreeing with the conclusions reached by the court in *Favor v. Boston R. Co.*, supra, approved the principles enunciated in *Pa. R. Co. v. Barnett*, 59 Pa., 263, 98 Am. Dec., 346.

It was further held in that case that the question of negligence in failing to give notice should be left to the determination of the jury. Counsel for plaintiff in error cites the case of *Farley v. Harris*, reported in 40 Atl., 798, and decided by the supreme court of Pennsylvania in 1898, which case it is claimed, is a modification of the rule laid down in *Railroad v. Barnett*, 59 Pa., 259, 98 Am. Dec., 346. In that case it appeared that the plaintiff was crossing an overhead bridge, when his horse became frightened, ran away, and injured the plaintiff. The grounds of recovery alleged in that case were two: (1) That the whistle had been negligently sounded when the locomotive was immediately under the bridge; and (2) that no whistle had been sounded by the locomotive on approaching this overhead bridge.

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The court said that the rule applicable to grade crossings—that it is negligence in railroad companies not to give warning on approaching them—has no application to under and over crossings at every street crossing in a city. The court, in concluding its opinion, says that the cases cited by the appellant (*Railroad Company v. Barnett*, 59 Pa., 259, 98 Am. Dec., 346, and other cases) are all applicable to a different state of facts than are presented here.

A careful examination of *Farley v. Harris*, supra, will show that the gravamen of the action was the blowing of the whistle when Farley was on the bridge, and the locomotive was directly beneath it. The proof was that the fright of the horses was caused solely by the blasts of the whistle when Farley was in the middle of the bridge. It is true that in the midst of the opinion the court said that the rule applicable to grade crossings has no application to under and over crossings at every street crossing in a city. "In fact," continued the court, "such crossings are constructed on the theory that, by adopting them, travel is unobstructed, and danger to travelers on parallel and cross streets is lessened by the absence of the screams of steam whistles necessary to give warning at grade crossings." The court then said that *Railroad v. Barnett*, 59 Pa., 259, 98 Am. Dec., 346, and other cases cited, are all applicable to a different state of facts, and concludes by saying: "Our decision is based solely on the circumstance of an accident at a properly constructed overhead bridge at one

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of the many street crossings of a steam railroad in a city." After an examination of all the authorities cited, we think the true rule deducible therefrom is that, if the place is dangerous, then the company is onerated with the duty of warning travelers on the highway of the approach of its trains, but whether the place, as a matter of fact, is dangerous, is a question for the determination of the jury. The law imposed no absolute duty upon the company to give notice at this particular crossing. That duty was only required, as matter of law, in the event the jury should find that danger was to be reasonably apprehended at this conjunction of underpass and overhead bridge. The charge of the trial judge in this case made the duty of the company absolute to give warning of the approach of the train to the crossing. Said the court: "It was the duty of the defendant company to give plaintiff reasonable warning of the approach of the train by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track." There was no such absolute duty resting upon the company either at common law or by statute, but its duty in this respect was entirely dependent upon the question of fact whether the place was dangerous. The charge of the court should have been so formulated as to leave to the determination of the jury the dangerous character of the place, as the predicate for the application of the principle of law announced. For the error indicated, the judgment is reversed and the cause remanded.

Green v. Snyder.

GREEN v. SNYDER.*(Nashville. December Term, 1904.)*

- 1. NONRESIDENT.** Process may be served upon agent of, when. Whenever a corporation, company or individual has an office or agency or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made upon any agent or clerk in all actions brought against such corporation, company or individual in that county.

Code cited and construed: Secs. 4516, 4542-4546 (S.); secs. 3516, 3539 (M. & V.); secs. 2811, 2834 (T. & S. and 1858).

- 2. SAME.** Same. Not confined to suits arising in county. And such service is not confined to suits growing out of business carried on in that county by such nonresident corporation, company or individual, but extends to its business and transactions generally.

Cases cited and approved: *Toppins v. Railroad*, 5 Lea, 604; *Railroad v. Walker*, 9 Lea, 481.

- 3. ATTACHMENT.** Not to be resorted to when personal service can be had.

Attachment of property is not the ordinary mode of obtaining jurisdiction, but it is extraordinary, and not to be resorted to when personal service can be had in order to obtain such jurisdiction.

Code cited and construed: Sec. 5284 (S.); sec. 4265 (M. & V.); sec. 3524 (1858).

Case cited and approved: *Turcott v. Railroad*, 101 Tenn., 105.

- 4. STATUTE OF LIMITATIONS.** Bars action, when. Case in judgment.

An action for damages for personal injuries alleged to have been inflicted December 27, 1900, was brought May 12, 1902, by the

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issuance and levy of an original attachment, in lieu of personal service of process, on the ground that defendant was a non-resident of Tennessee. Defendant pleaded in abatement to the attachment that, although he did not reside in Tennessee, he had, continuously and without interruption, between the date of the injury and the time suit was begun, carried on business and had an office and agents and representatives in the county where the suit was brought. A demurrer to this plea was sustained by the court below. Defendant then pleaded, among other defenses, the statute of limitations.

Held:

1. That the demurrer to the plea in abatement was improperly sustained; and,
2. That, if the averments of the plea in abatement are true, the plaintiff might at any time have brought his suit and had personal service upon an agent of defendant, and failing to do so within one year after the injury, no recovery can be had over defendant's plea of the statute.

FROM DICKSON.

Appeal in error from the Circuit Court of Dickson County.—B. D. BELL, Judge.

M. SAVAGE and H. N. LEECH, for Green.

W. B. LEECH, for Snyder.

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MR. JUSTICE WILKES delivered the opinion of the Court.

This is an action for damages for personal injuries. The injuries were alleged to have been inflicted December 27, 1900, and the suit was brought May 12, 1902, by the issuance and levy of an original attachment in lieu of personal service of process, and upon the ground that Martin Snyder, trustee, was a nonresident of Tennessee.

Defendant pleaded in abatement that, while he did not reside in Tennessee, yet he had, when the injury occurred and when the suit was brought, and without interruption, but continuously between those dates, an office and place of business in Dickson county, Tennessee; that the suit grew out of the business carried on in that county; that he had at said place of business superintendents, agents, clerks, bookkeepers, and representatives, which fact was well known to the plaintiff; and that service could at any time have been made upon him through these agents; and hence no action by attachment would lie.

The plaintiff demurred to this plea, and the demurrer was sustained. Defendant sought to appeal, but this was denied him.

Defendant then pleaded to the action, and among other defenses, set up the statute of limitations, proceeding upon the theory that plaintiff might at any time have brought his suit, and had personal service

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upon any of his agents, and, failing to do so within one year after the injury, the action was barred.

We are of opinion that under the provisions of our statute (Shannon's Code, secs. 4516, 4542-4546), whenever a corporation, company, or individual has any office or agency or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made upon any agent or clerk in all actions brought against such corporation, company, or individual; and this has been construed to extend to its business and transactions generally. *Toppins v. Railroad*, 5 Lea, 604; *Railroad v. Walker*, 9 Lea, 481.

Attachment of property is not the ordinary mode of obtaining jurisdiction, but it is extraordinary, and not to be resorted to when personal service can be had in order to obtain such jurisdiction.

Of course, attachment may be resorted to upon any of the grounds pointed out in the statute for its issuance, but we are referring to it simply and alone as a means of executing process and bringing a person into court; that is, when it is in lieu of personal service to obtain jurisdiction. Shannon's Code, sec. 5284.

This being so, the demurrer to the plea was improperly sustained.

If the fact was as stated in the plea, then the court could not acquire jurisdiction of the defendant by an attachment, but only by personal service; just as no attachment would lie against a resident upon whom per-

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sonal service could be had. *Turcott v. Railroad*, 101 Tenn., 105, 45 S. W., 1067, 40 L. R. A., 768, 70 Am. St. Rep., 661.

In addition if the facts stated in the plea are true, the action of plaintiff is barred by the statute of limitation, and no recovery could be had over defendant's plea of the statute

The judgment of the court below, sustaining the demurrer, is overruled, and the cause remanded for issue upon the plea and further proceedings.

Appellee will pay the costs of appeal.

Heath v. Manire.

HEATH v. MANIRE.

(Nashville. December Term, 1904.)

1. **TURNPIKE COMPANIES.** Provisions of Code confined to companies organized thereunder.

The provisions of the Code of 1858, chap. 2, entitled "Of Private Corporations," art. 1, entitled "Corporations for the Construction of Macadamized, Graded, Turnpike, Rail and Plank Roads," are confined in their operation to companies organized under that article.

Code cited and construed: Secs. 1400-1446 (1858).

2. **SAME.** Same. Created by special act, not subject to limitations of the Code as to toll.

A turnpike company chartered by special act (1859-60, ch. 3) is not subject to the limitations upon the right to take toll contained in Code of 1858, sec. 1437, providing that "No toll shall be claimed or taken from any person passing from one part of his farm to another part thereof . . . or to or from a gristmill with grain for family use."

Acts cited and construed: 1859-60 (Private), ch. 3; 1851-52, ch. 266, secs. 8-11; 1831, ch. 46; 1829 (Private), ch. 255.

Code cited and construed: secs. 1436, 1437 (1858).

3. **SAME.** Created by special act, not subject to provisions of subsequent general law.

Neither is such company governed by Acts 1875, chap. 142, sec. 7, providing that "No toll shall be demanded from persons passing from one to another part of his farm . . . or from persons going to or returning from a gristmill, on horseback, with grain for family use."

Acts cited and construed: 1875, ch. 142, sec. 7.

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- 4. SAME.** Cannot take toll from one going to mill on horseback, when.

A turnpike company, created by special act, that has complied with the requirements of sec. 2, ch. 369, Acts 1899, so as to obtain all the rights, powers and privileges conferred by the acts therein named, has thereby made the schedule of tolls provided for in Acts 1875, ch. 142, sec. 7, a part of its charter, and it cannot charge toll as against persons "going to, or returning from, a gristmill, on horseback, with grain for family use."

Acts cited and construed: 1899, ch. 369; 1875, ch. 142.

- 5. SAME.** May take toll from one going to mill on two-horse wagon.

A turnpike company that is forbidden to take toll from persons "going to, or returning from, a gristmill, on horseback, with grain for family use," is not prohibited from charging toll as against one who is going to mill, on a two-horse wagon, with a load of grain to be ground for family use.

FROM RUTHERFORD.

Appeal in error from Circuit Court of Rutherford County.—W. C. HOUSTON, Judge.

R. S. BROWN, for Heath.

RICHARDSON & RICHARDSON, for Manire.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This action was tried upon an agreed statement of facts. The plaintiff in error is the tollgate keeper of

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- the Eagleville & Salem Turnpike Company, and he has brought this suit to recover a toll of fifteen cents and a penalty of \$5, which he claimed had accrued to his company on account of the refusal of the defendant in error, Manire, to pay the toll demanded of him for passing through the tollgate with a two-horse wagon. The payment of this toll was declined upon the ground that Manire at the time was going with a load of grain to the mill where it was to be ground for family use. This contention was sustained by the circuit judge, who tried the case without the intervention of a jury, and the turnpike company, for whose use the suit is brought, asks now that this judgment be reversed.

The plaintiff in error was chartered in the year of 1859 by a special act of the legislature. The charter conferred upon it all the rights and privileges given to the Salem Turnpike Company, incorporated in 1851-52 (Acts 1851-52, p. 445, c. 266), and this latter company was clothed with all the rights granted to the Nashville, Murfreesboro & Shelbyville Turnpike Company, chartered in the year 1831, and that company was clothed with all the rights and privileges of the Nashville & Murfreesboro Turnpike Company, chartered in January, 1830.

By none of these charters was there a restriction or limitation upon the right of the company to charge toll for a wagon passing through a tollgate, loaded with grain which was being carried to a gristmill to be ground for family use. But it is insisted, in support of

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the judgment of the court below, that this limitation or restriction is to be found in section 1437 of the Code of 1858, which was in operation at the time of the granting of the charter to plaintiff in error, and the argument is that under a well-recognized rule of construction this section became incorporated with the charter of the defendant in error, and formed a part and parcel of the same. Section 1436 fixed the amount of tolls that might be demanded of persons and property passing through the tollgate or tollgates of the corporation, provided for in the chapter, of which these two sections formed a part. The limitation upon the right granted in section 1436 and found in section 1437 is as follows: "But no toll shall be claimed or taken from any person passing from one part of his farm to another part thereof, . . . or to or from a gristmill with grain for family use."

If these two sections had been general in character, and there had been nothing further in the record, we would entertain no doubt that they became a part of the charter of the plaintiff in error, granted subsequent to their enactment, although no reference to them was made in the charter. But these sections were not general. Their operation, we think, was confined to the companies whose incorporation was contemplated and provided for in the chapter of the Code entitled "Of Private Corporations." Article 1 of this chapter is headed "Corporations for the Construction of Macadamized, Graded, Turnpike, Rail and Plank Roads," and

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provides in its various sections the plan by which parties who desire to incorporate themselves for the purpose of building one or more of these roads may organize and accomplish their purpose without calling upon the legislature for a special charter. We think it clear that the limitation imposed by section 1437 was to be applied to such corporations. That the legislature had the right to grant a special charter, as was done in the case of the Eagleville & Salem Turnpike Company, and confer upon it extensive or restricted powers, without regard to the limitations imposed upon a company organized under the general act, cannot admit of question. We think that the legislature in the present case granted an unrestricted charter, and that there is no sound rule of construction which either requires or authorizes the courts to hold that it intended the limitation imposed upon a corporation called into being under a general act should be borne by this corporation, created by special charter.

So it is that the judgment of the court below, if to be maintained at all, must be rested upon some other ground. It is insisted that such ground is to be found in certain other acts of the legislature, which will now be referred to. In 1875 the legislature passed an act to provide for the organization of corporations, which is chapter 142, page 232, of the published acts of that year. Section 7 of the act (page 240) provides for the incorporation of turnpike companies, and provides for rates of toll to be charged by such companies. But it

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was also provided by this section that "no toll shall be demanded from persons passing from one to another part of his farm . . . or from persons going to or returning from a gristmill, on horseback, with grain for family use." It will be seen in this provision that exemption to the party passing through a gate of the turnpike company is confined to one going to or returning from a gristmill, with grain for family use, on horseback. Under the Code of 1858, providing for this exemption in the case of turnpike companies organized under the general act, this exemption operated in favor of all persons who were on their way to or from a gristmill, whether the grain was carried on horseback or in wagons, whereas in this latter act it is limited to such persons as were carrying their grain on horseback. We are unable to discover a reason for this variance, but we find that it exists, and, so existing, makes a material difference as to the rights of parties who claim the benefit of the exemption. Subsequently the legislature passed certain other acts affecting turnpike companies in this State, but as it made no modification in respect to the matter which is in controversy it is unnecessary to allude more particularly to them. It is apparent that this act of 1875 could have no effect upon the charter rights of this corporation, chartered many years prior thereto. In 1899, however, the legislature, realizing there was great diversity of burden and privileges between the turnpike companies of the State incorporated at different times, and many of them having spe-

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cial charters, passed an act, which is chapter 369 of the session acts of that year, the avowed purpose of which was to bring about uniformity in the charters of turnpike companies, and uniformity in the required width and grade of the same, and to bring about a reduction of tolls charged on turnpikes chartered by acts of the general assembly. By section 1 of that act it was provided that all turnpike companies in the State, chartered by the legislature, might obtain all of the rights, powers, and privileges conferred on such companies under section 7, chapter 142, page 240, of the Acts of 1875, and certain other acts named in the section. But to obtain the advantage of these acts it was provided by section 2 that these companies should sign an agreement, through the majority of their board of directors, acknowledged before properly qualified officers, that they would not charge toll, among others, as against persons "going to or returning from a gristmill, on horseback, with grain for family use;" thus repeating the exact language of the exemption provided for such persons by the act of 1875. The company in question, through its board of directors, made the agreement required by the act of 1899, page 869, chapter 369, section 2, and in doing so made the schedule of tolls provided for in the former act a part of the charter under which it is now operating its road. The question, then, is, can one who is engaged in the carriage of grain to a gristmill to be ground for family use avail himself of this exemption, when, instead of using a horse for this

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purpose, he sees proper to carry his grain in a two-horse wagon? We think he cannot. Such a person is certainly not within the letter of the statute, and we see nothing that would authorize us to hold that he was within its spirit. The legislature in these two acts, passed at an interval of fourteen years, saw proper to narrow the exemption in favor of such persons given by the Code of 1858, and it must be held, we think, that the act of 1899 was intended by the legislature to emphasize the fact that the restriction made in the act of 1875 was intelligently and deliberately done. It may be that in thus narrowing the exemption granted by the Code of 1858 the legislature was controlled by the fact that a wagon used for the purpose of carrying grain to mill would impose more of a burden and inflict more of wear and tear upon a turnpike than if the grain was carried on horseback. But, whatever the motive, the legislature has so provided in the act, and we know of no authority for an enlargement by the court of its scope.

The case relied upon to support the action of the trial judge was decided by the referee court in the year 1885, followed by a judgment (in 1886) pronounced by this court affirming the report of that court. This judgment was rested upon the assumption that the Code provisions referred to above became a part of the charter of this turnpike company granted in 1859-60 (Acts 1859-60, p. 147, c. 3). This view, however, we have already held to be unsound. It follows, therefore, that

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the decision in that case cannot be relied upon as authority in the present case.

The judgment of the court below is reversed, and a judgment will be entered here for the amount of the toll, and the penalty accrued for its nonpayment, and the costs of the cause.

Johnson v. Iss.

JOHNSON v. ISS.

(Nashville. December Term, 1904.)

1. **CONTRACT OF MARRIAGE.** Will not sustain suit for breach of promise, when.

An agreement to intermarry is illegal, and will not sustain an action for a breach of marriage contract, when it appears that the plaintiff was a married woman at the time of the promise by defendant, and such promise was made within five years after the disappearance of plaintiff's husband who had deserted her and was not known to be living.

Code cited and construed: Sec. 4188 (S.); sec. 3293 (M. & V.); sec. 2438 (1858).

2. **SAME.** Same. Not cured by agreement to postpone marriage until legal objections removed.

The illegality of the contract is not cured by the fact that the marriage was not to take place until after the five years prescribed by statute had expired, or until plaintiff should procure a divorce from her husband. Such contracts are immoral and against public policy, and cannot be recognized by the courts of this State.

3. **SAME.** Same. Differentiated from contract made by innocent party.

Such contract is to be differentiated from one in which an innocent party makes a contract of marriage with another who is married, in ignorance of the fact that such other person is at the time a married man or woman.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County.—J.
A. CAETWRIGHT, Judge.

Johnson v. Iss.

WM. G. BRIEN and WM. S. NOBLE, for Mrs. Johnson.

W. A. GUILD, G. N. GUTHRIE, T. C. MULLIGAN and J. P. HELMS, for Iss.

MR. JUSTICE NEIL delivered the opinion of the Court.

An action for breach of promise of marriage. The plaintiff in error relies upon the following section of the Code (Shannon's Code, sec. 4188): "A second marriage cannot be contracted before the dissolution of the first. But the first shall be regarded as dissolved for this purpose, if either party has been absent five years, and is not known to the other to be living."

A plea was filed making the defense that the plaintiff was a married woman at the time the contract was entered into. To this she filed a replication alleging, among other things, a promise after the five years had expired. In her evidence before the jury, however, she testified that she intermarried with her husband on the 26th of May, 1898, that they lived together three weeks, that at the expiration of that time he disappeared, and that the last promise which the defendant made to her was in January, 1903. This was only four and one-half years after the disappearance of the husband. It thus appeared from the plaintiff's testimony that while she was still, in the eyes of the law, a wife, she engaged herself to be married to the defendant, Iss. Such a contract, made under the circumstances stated, is against public policy, and can furnish no standing to a plaintiff

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in any court. The illegality of the contract was not cured by the fact that the marriage was not to take place until after the five years prescribed by statute had expired, or until plaintiff should procure a divorce from her husband. Such contracts are immoral, and cannot be recognized by the courts of this State; and the circuit judge acted within his powers, and correctly, when he arrested the further progress of the case, and dismissed it, upon the illegal nature of the demand of the plaintiff thus incontestably appearing. Of course, the case above stated is to be differentiated from one in which an innocent party makes a contract of marriage with another who is married, in ignorance of the fact that such other person is at the time a married man or woman.

Let the judgment of dismissal be affirmed.

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LIEBERMAN, LOVEMAN & O'BRIEN *et al.* v. JAMES N.
CLARK *et al.*

(Nashville. December Term, 1904.)

1. **FINDING OF FACTS.** In a case tried by the circuit court judge without a jury is conclusive, if supported by some evidence.

Where, in a replevin suit in the circuit court to recover logs, tried before the judge without the intervention of a jury, there is some evidence to support his finding that the plaintiff was in possession of the land from which the logs were cut by the defendant at the time they were cut, that question, on appeal, must be determined in favor of the plaintiff. (*Post*, pp. 121, 122.)

2. **REPLEVIN.** Possession will support replevin against a trespasser.

The special property conferred by possession is sufficient to support an action of replevin against a trespasser. (*Post*, pp. 122, 125-128.)

Cases cited and approved: Crawford v. Bynum, 7 Yer., 381; Shaddon v. Knott, 2 Swan, 358, 363; Wilson v. McQueen, 1 Head, 17, 18; Criner v. Pike, 2 Head, 398; Carson v. Prater, 6 Cold., 565; Brammell v. Hart, 12 Hols., 366; Shields v. Dodge, 14 Lea, 356; Cartwright v. Smith, 104 Tenn., 689, 690, 691; Railroad v. Hall, 107 Tenn., 512.

3. **SAME.** In an action to recover logs, title papers may be looked to for purpose of defining possession of land

In an action of replevin to recover logs cut from land in possession of plaintiff, it is not improper in the court to look to the deeds showing title in plaintiff for the purpose of defining his possession. (*Post*, pp. 123, 132.)

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4. **CHAMPERTY.** Deed for land in the adverse possession of another by actual possession and consequent constructive possession to extent of boundaries of title papers is champertous and void.

Where the plaintiff in an action of replevin to recover timber was in the adverse possession of the land from which the timber was taken, by actual possession of part and the consequent constructive possession of the rest to the extent of the boundaries in his title papers, a deed made by a person out of possession, under which the defendant entered on the land and removed the timber from that part so adversely held by such constructive possession, cannot protect the defendant against a recovery, because such deed is champertous and void as to the whole tract so adversely held. (*Post*, p. 123.)

Case cited and approved: *Green v. Coal & Coke Co.*, 110 Tenn., 35.

5. **ADVERSE POSSESSION.** Actual possession of part of land under registered assurance of title extends adverse possession to the whole tract, enabling such adverse possessor to maintain a replevin suit for timber felled and removed therefrom.

Adverse possession of land under a registered assurance of title, or color of title, by actual possession of part of the land extends not only to the actual possession, but also to the limits or boundaries contained in the title papers of such adverse possessor, and to the timber growing thereon, so as to enable such adverse possessor to pursue and recover the timber felled and removed therefrom, by an action of replevin, without derailing his title, and regardless of the invalidity of his title or the superiority of the title of the person who felled and removed the timber therefrom, under a deed made to him after such possession was taken and during the continuance thereof. (*Post*, pp. 124-141.)

Cases cited and approved: *Hart v. Vinsant*, 6 Hels., 616, 618, 619; *Pullen v. Hopkins*, 1 Lea, 741; *Hicks v. Tredericks*, 9 Lea, 491;

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Hunter v. Bills, 3 Tenn. Cas., 97, 101; Hebard v. Scott, 95 Tenn., 467; Turnage v. Kenton, 102 Tenn., 328; Winters v. Hainer, 107 Tenn., 337; Elliott v. Coal & Coke Co., 1 Cates, 745; Green v. Coal & Coke Co., 2 Cates, 35; Mansfield v. Northcut, 4 Cates, 536; Cooper v. Watson, 73 Ala., 252, 255; Anderson v. Hapler, 34 Ill., 436, 439; Eaton v. Southby, Willes, 131; Snyder v. Vaux, 2 Rawle, 427; Vausse v. Russell, 2 McCord, 329; Mather v. Church, Serg. & R., 509; Baker v. Howell, 6 Serg. & R., 476; Brown v. Caldwell, 10 Serg. & R., 114; Powell v. Smith, 2 Watts, 126; DeMott v. Hagerman, 8 Cow., 220; Davis v. Easley, 13 Ill., 192; Stockwell v. Phelps, 34 N. Y., 363, 364; Rich v. Baker, 3 Denio, 79; Page v. Fowler, 28 Cal., 605; Halleck v. Mixer, 16 Cal., 579; Rees v. Higgins, 9 Kan. App., 832, 834; Core v. Faupel, 24 W. Va., 245; Hodges v. Eddy, 38 Vt., 327; McColeman v. Wilkes, 3 Strob. (S. C.), 465, 471; Jeffrey v. Owen, 41 N. J. Law, 260; Newcome v. Crews, 98 Ky., 339; Brown v. Volkening, 64 N. Y., 80; Foust v. Territory, 8 Okla., 541; Mitchell v. Bridges, 113 N. C., 63; Graham v. Houston, 15 N. C., 232; Sullivan v. Sullivan, 66 N. Y., 37.

Case cited and disapproved in part: Hart v. Vinsant, 6 Heils., 616.

6. DEEDS OF CONVEYANCE. Referring to State's grant by its number is sufficient, where such grant describes the land.

Deeds which refer to the State's grant of land by its number cannot be excluded on the ground that they do not describe any land, where the grant describes the land. (*Post*, p. 141.)

7. REPLEVIN. Plaintiff with right may join others with him without right.

Where the whole possessory right of property is in one of the plaintiffs in an action of replevin, it is immaterial to the defendants that he joins others with him in the suit, and shares his recovery with them. (*Post*, p. 141.)

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8. **SAME.** Same. Joinder of grantor of portion of land and grantee as plaintiffs obviates the question as to which part of the land the timber was cut on.

Where a grantor of a portion of a tract of land and his grantee join in an action of replevin to recover timber felled and removed, it is immaterial to the defendant that the timber or part of it may have been cut and removed from the portion so sold and conveyed. (*Post*, pp. 141, 142.)

9. **SAME.** Immaterial whether timber was cut from land of plaintiff or a third person who transferred his right to plaintiff before suit.

Where a third person transferred his right in timber, whatever it might be, to the plaintiff prior to the institution of the replevin suit, it is immaterial to the defendant that part of the timber was cut from the land of such third person, and it was impossible to distinguish it. (*Post*, p. 142.)

FROM FENTRESS.

Appeal in error from the Circuit Court of Fentress County.—D. L. LANDSDEN, Judge.

A. M. ROBERTS and CONATZER & CASE, for Wheeler, Administrator.

EVANS & SNODGRASS, for Clark et al.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the circuit court of Fentress county in replevin, by defendants in error, to re-

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cover of plaintiffs in error forty-five logs. The case was tried before Hon. D. L. Lansden, chancellor, sitting as circuit judge, without the intervention of a jury. He rendered a judgment in favor of Clark and others against Lieberman, Loveman & O'Brien and the estate of Hizar Beaty (J. T. Wheeler, administrator), and the latter alone appealed.

There was evidently a purpose on the part of Hizar Beaty, in taking the logs, to compel defendants in error to try the title to the land on which the logs grew, through the agency of the replevin suit; but his honor found as a fact that the defendants in error were in possession of the land on which the logs grew at the time they were cut by the said Hizar Beaty, and he declined to consider the question whether the defendants in error had the superior title. He passed upon certain title papers of the plaintiffs in error, holding them void on the ground of champerty, for the purpose of determining the question of conflicting possession.

The plaintiff in error appealed from the judgment of his honor, and has filed numerous grounds of error. These assignments cover a wide scope, ranging over the whole field of title, and, besides, raising numerous questions of evidence. In the view we take of the case, it will be necessary to notice only a few of the assignments.

There is some evidence in the record to support the finding of his honor that the defendants in error were in possession of the land from which the logs were cut

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by Hizar Beaty at the time they were cut. So on this appeal that question must be determined in their favor.

The land referred to was covered by grant No. 3,329, issued on the 22d of April, 1834, to Milton King. There are in the record two deeds purporting to convey the same land to Bruno Gernt, one of the defendants in error; a deed from A. Litton, Jane E. Litton, and Alice W. Litton, of date September 13, 1889; and a deed from Claiborne Beaty, of date March 5, 1890. There is also in the record a lease, of date August 3, 1896, made by Bruno Gernt, Sidney Beckwith, W. L. Jenks, W. W. Jones, and James N. Clark (defendants in error), to one Abe Franklin, covering this same land. There is also testimony in the record to the effect that while Abe Franklin was holding under this lease, residing in a house built upon the land, the said Hizar Beaty entered upon the land and cut the logs.

Upon the strength of this testimony, his honor held that the defendants in error were entitled to recover in replevin, regardless of the question concerning the ultimate title to the land, since the special property conferred by possession is sufficient to support the action of replevin against a trespasser.

We think his honor's view was correct. The rule referred to is necessary to the preservation of the peace of society. If it should not be maintained, it would soon result that men, everywhere, in cases of disputed title to personal property, would seize the property by the strong hand, at the outset, for the purpose of forc-

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ing upon the adversary party the necessity of taking the initiative in a burdensome suit, and assuming the *onus* of proof as to title.

It is insisted that, if the chancellor was at liberty to decline to go into the final question of title to the land on which the logs grew, it was inconsistent and improper in him to look to the deeds above referred to for the purpose of defining possession.

We do not think so. The use of deeds and even title bonds for this purpose is quite common. The question proposed for consideration was not one of title, but only of possession—a distinct, independent, and legal inquiry under our system of real property law.

To meet this special phase of the case made by the defendants in error, the plaintiffs in error offered in evidence in the court below a deed purporting to have been made by the Union Land, Coal & Coke Company to the Cumberland Coal & Coke Company, of date September 24, 1899, covering the same land, and testimony tending to show that Hizar Beaty cut the logs under the authority of the latter company. The deed was objected to by the defendants in error on the ground of champerty, because the testimony showed that they (defendants in error) were in possession of the land, by a tenant residing thereon, when the deed in question was made. This objection was sustained by the chancellor and the deed excluded. To this action error is assigned here by the plaintiffs in error.

There can be no doubt, under our statute, that such

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a deed is void. *Green v. Cumberland Coal & Coke Co.*, 110 Tenn., 35, 72 S. W., 459. But plaintiffs in error reply to this that even a void deed may be "color of title," under our decisions, and a possession thereunder, if held long enough, may, under the statute of limitations, ripen into a good title, which is, of course, true. From this it is urged that the entry upon the land under the champertous deed in question was lawful, and neutralized the prior possession under the two Gernt deeds referred to.

We think the conclusion is based upon a false assumption. Possession under a false deed cannot, in the very nature of things, be rightful. In fact and in law it is wrongful against the person having the true title, and the true right of possession attendant upon that title, during every day it lasts, until the full term of seven years has been completed. When that time arrives, the possession having been open, notorious, adverse, and undisturbed, and the deed having been registered during the full term of seven years, a distinct right is conferred upon the hitherto wrongful possessor by positive law—our statute of 1819, based upon a well-known public policy, which need not be more particularly referred to. Shannon's Code, sec. 4456. When this term of seven years has been thus completed under color of title, various questions may and do arise, in estimating the value of that possession, looking back over its course. Among these is the question of the neutralization of one possession by another. It is held that, in the case of

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the interlap of grants, rival possessions within the interlap will neutralize each other, and the case must be determined upon the strength of title.

These doctrines find their most ordinary application in cases arising under the statute of limitations, albeit they are sometimes controlling in questions purely of possession. It is not true, however, that if one be in actual possession of a portion of a tract of land, by a house or other inclosure built thereon, occupied by a tenant, under a deed defining boundaries, under which state of facts the possession is extended by construction of law to the whole boundary covered by the deed (*Mansfield v. Northcut*, 4 Cates, 536, 80 S. W., 437), another may enter upon the same land under a forged or a champertous deed, and force the former to bring ejectment against him, or proceed, after entering, to cut timber, and, when sued by the former in replevin for the timber itself, or when sued for the value, compel such prior possessor to try the title to the land on which the timber grew. Certainly, if such suit be brought within three years (Shannon's Code, sec. 5096) for possession against such interloper, the action would be one in forcible entry and detainer, and not ejectment, and in such an action the question of title would not arise, but only the question of prior possession. The same would necessarily be true of a suit brought within three years to recover for timber cut, whether in a direct action for the timber itself, as in the present case, or for the value of it. Whether this rule would be different after the

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expiration of three years, we need not consider, since the present action was brought within less than three months after the seizure of the logs. However, there can be no doubt that adverse possession of personal property for three years would vest title therein (Shannon's Code section 4470; *Morris v. Lowe*, 97 Tenn., 243, 36 S. W., 1098) so as to bar an action for the property itself. But it is, beyond question, true that prior possession itself would furnish a sufficient basis of right to support an action against a trespasser for either real or personal property. Prior possession, in and of itself, confers a right as against all trespassers, or persons seizing property without due process of law; and the law will protect that right against such persons by restoring, through an appropriate possessory action, that possession, when it is violated in the manner indicated. Any other course of decision would soon fill the State with vexatious and wasteful litigation, if not with violence and bloodshed. Under the opposite theory, how easy it would be to disturb any man's title! And how great the reward for disrupting the peace of society! Any man coveting the land of another could cause a third party to make him a deed purporting to convey an estate in fee, and then enter upon the land and proceed to hold it, or even merely to cut timber; and, to enable the prior possessor to obtain redress, he must submit to a raking fire on his title, from turret to foundation stone. If such investigation reveal one spot of fatal weakness, his arms of both attack and defense are shattered in his hands, and the in-

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terloper is left in possession of the property; and this not because he has the better right, but because he was shrewd enough to discover the weakness of his victim's position, and bold enough to place himself in an attitude where that victim would be compelled to attack him under an irretrievable disadvantage, and to encounter inevitable defeat.

In *Cartwright v. Smith*, 104 Tenn. 689, 690, 691, 58 S. W., 331, it is said: "The gist of the action [replevin] is that the defendant is in possession of the property, and that plaintiff is entitled to the possession. Judge Caruthers, in treating the sections of the Code regulating actions of replevin, has said, viz: 'Upon a fair construction of the whole of this act, and by it judging of the intention of the legislature, we are constrained to decide that it will lie in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant. In all such cases the property is unlawfully detained from the plaintiff by the defendant, and therefore falls within the plain language and meaning of the act.' " In accord: *Shaddon v. Knott*, 2 Swan, 358, 363, 58 Am. Dec., 63; *Wilson v. McQueen*, 1 Head, 17, 18; *Brammell v. Hart*, 12 Heisk., 366; *Shields v. Dodge*, 14 Lea, 356. And compare *Crawford v. Bynum*, 7 Yerg., 381; *Criner v. Pike*, 2 Head, 398; *Carrson v. Prater*, 6 Cold., 565; *Railroad v. Hall*, 107 Tenn., 512, 64 S. W., 481. "Where property which has been annexed to the freehold is severed therefrom, even by a

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wrongdoer, it becomes personal property, so as to become recoverable by an action of replevin." 24 A. & E. Encyc. Law (2d Ed.), p. 481, and cases cited; 28 A. & E. Encyc. Law (2d Ed.), p. 543. "Where the title to property which has become personalty by reason of its severance from the soil or freehold depends upon the ownership of the real estate, it has been held that the true owner, if out of possession, could not in replevin recover the property, where its severance from the freehold was made by a person holding adversely and in good faith under claim and color of title, as the action of replevin could not be made the means of litigating and determining the title to real estate as between conflicting claimants." 24 A. & E. Encyc. Law (2d Ed.), p. 486.

In *Cobbey on Replevin* (Ed. 1890) it is said: "Under the authorities, it is allowable in a replevin action to examine into the title of the real estate just far enough to determine whether or not there are adverse claimants to the real estate. If there are, the validity of their claims cannot be tried in the replevin action; but, if there are not adverse claimants to the realty, the title may be shown in the replevin action for the purpose above stated." Sections 353, 374, 375, 376, 382.

In *Cooper v. Watson*, 73 Ala., 252, 255, it is said: "The doctrine seems well settled, upon principle and authority, that if the owner of the land be not in the actual possession—if he can show title to things severed from it only by showing title to the land—a personal action

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for the taking, conversion, or detention of such things will not lie. If he have the possession at the time of the severance, the rule is different. But if this possession is divested—if his right lie in entry—and the adverse possessor gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the things severed are converted into chattels. But they do not become the property of the owner of the land. He is out of possession, and has no right to the immediate possession of such things, nor can he bring any action to recover them until he gains possession." "To hold the law otherwise," as said in Smith's Leading Cases, quoted in the preceding case, "would be to bring the title to the land in dispute in a transitory action, although the plaintiff had not adopted proper means for reducing his title to possession. For, if the general right to land, unaccompanied by possession, were viewed as giving first a general right of property in whatever may be severed from the freehold, and then a consequent constructive possession, the only question in an action of trover or replevin brought against an actual possessor would be as to the party in whom the title to the realty lay."

The point may be enforced by a few excerpts from other authorities:

In *Anderson v. Hapler*, 34 Ill., 436, 439, 85 Am. Dec., 318, it is said: "Our statute gives the remedy where the goods or chattels have been wrongfully distrained or otherwise wrongfully taken, or shall be wrongfully de-

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tained. The possession of the land was always a sufficient title thereto as against a stranger. The rightful owner could not forcibly enter and eject a disseisor, nor question his rights, excepting in a real or possessory action for the recovery of the land. The possessor of land might bring replevin for chattels severed from the freehold, and, as the ownership of lands drew to it the constructive possession, the owner might bring replevin for chattels thus severed where there was no adverse possession. But the owner could not bring replevin for chattels severed from land in the adverse possession of the defendant or of a third person. The law does not permit him to assert his title to the land against the person in adverse possession in that manner." Citing *Morris on Replev.*, 57, 58; 1 *Smith's Lead. Cas.*, 485; 1 *Chitty*, Pl. 163; *Eaton v. Southby*, Willes, 131; *Snyder v. Vaux*, 2 *Rawle*, 427; *Vausse v. Russell*, 2 *McCord*, 329; *Mather v. Trinity Church*, 3 *Serg. & R.*, 509, 8 *Am. Dec.*, 663; *Baker v. Howell*, 6 *Serg. & R.*, 476; *Brown v. Caldwell*, 10 *Serg. & R.*, 114, 13 *Am. Dec.*, 660; *Powell v. Smith*, 2 *Watts*, 126; *DeMott v. Hagerman*, 8 *Cow.*, 220, 18 *Am. Dec.*, 443; *Davis v. Easley*, 13 *Ill.*, 192.

In *Stockwell v. Phelps*, 34 *N. Y.*, 363, 364, 90 *Am. Dec.*, 710, it is said: "Replevin, or an action in the nature of a replevin, in the *cepit*, can only be brought when trespass could be maintained, and that would only lie for an injury to land when the plaintiff is in possession (*Rich v. Baker*, 3 *Denio*, 79; *De Mott v. Hagerman*, 8 *Cow.*, 220); and one being in the actual possession of the

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premises, claiming them as his own, is regarded as the owner, as to all the world, until after a judicial decision."

In *Brown v. Caldwell*, 10 Serg. & R., 114, 13 Am. Dec., 660, it is said: "Replevin is not the proper form of action to try title to land *ex directo*, though incidentally title to such action may sometimes be called in question. In Pennsylvania this action has been allowed a great sweep, and to embrace every question of property. But it is property in goods, and not in lands. It is to try the title to personal property, and not to real estate. Replevin will not lie for a tract of land. Title cannot be decided in an action merely personal and transitory, no matter whether replevin, trover, or assumpsit. Nor can these actions be maintained by one not in the actual, exclusive possession, whatever his title may be, against one who is in possession, claiming right. Here the possession is not vacant. The owner of the title is in the constructive actual possession."

In *Page v. Fowler*, 28 Cal., 605, 610, it is said, quoting from *Halleck v. Mixer*, 16 Cal., 579: "The true rule is this: 'The plaintiff out of possession cannot sue for property severed from the freehold when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title. In other words, the personal action cannot be made means of litigating and determining the title to the real property as between conflicting claimants.'"

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In *Rees v. Higgins*, 9 Kan. App., 832, 834, 61 Pac. 500, it is held that it is "not proper . . . to make a replevin action the means of litigating and determining the title to real property as between conflicting claimants."

The reason underlying all these cases is that the primary consideration in a replevin action is the right of possession, and that, as to things severed from the realty, the possession of land at that time determines the right of possession to such things, such person being in the adverse possession of the land, and claiming under color of title; that the court will determine the matter upon the right of possession, and not upon the title to the land; and finally that in such an action the court will not permit the title of the land to be determined.

There is one exception to be noticed. This is: Where neither party has actual possession of any portion of the land at the time the timber is cut, the right to the possession of such timber must be determined by the title to the land, since the law in that case would attach constructive possession of the land to the title. *Hart v. Vinsant*, 6 Heisk., 616. But even such a case evidence of title is permitted, "not for the purpose of trying the question of title to the land," but for the purpose of determining the question of possession. *Id.*, 618, 619.

Here it is necessary that we should pause for a moment, and note the meaning attached to the terms "actual possession" and "constructive possession" in the authorities.

Of course it would be idle to attempt a review of the

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cases within the limits of a judicial opinion, so great is their number, But they are collected in Am. & Eng. Encyc. Law, pp. 822 to 830; vol. 13, p. 745; vol. 28, pp. 238, 239; Cyc., vol. 1, pp. 983, 1125-1126. An examination of these authorities, text and notes, will disclose the following:

There is some diversity in the use of the terms above referred to, but a substantial agreement concerning the true test of adverse possession in cases such as we have before us, wherein it appears there is actual possession of a portion of tract of land by one claiming under color of title defining boundaries. In the first authority cited in the last paragraph it is said: "It is well established that possession which is necessary to ripen into title must be actual, and, to begin such possession, there must be an entry which will amount to an ouster of the true owner. It must be actual, either of all or part of the land claimed, as the same may be held with color of title or without, because constructive possession follows the title, and there cannot be two possessions of the same land at the same time, and the owner, being in possession by virtue of his title, remains until he is disseised by another entering and holding for himself." Am. & Eng. Encyc. Law, p. 822. "Mere naked possession without color of title is adverse only to the extent of the actual possession or inclosure. But an entry into possession under a conveyance from a person having color of title is presumed to be made according to the description in the deed, and his occupancy is construed as possession

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of the entire lot, where there is no actual adverse possession of the parts not actually occupied by him." *Id.*, p. 824. "A man cannot by mere physical means retain land in his exclusive grasp. Possession may be more manifest as to a part than as to the rest. Therefore it is an established rule of law that the actual possession of a part is the possession of the entire tract or boundary covered by the occupant's title or claim of title. . . . What is the extent of his possession is to be determined by the limits of his title or color of title. An intruder without color of title is of necessity confined to his mere inclosure." *Id.*, p. 825, notes, quoted from *Core v. Faupe*, 24 W. Va., 245. "The actual fencing and inclosure of the tract are not, unless expressly required by statute essential to constitute adverse possession, but such acts are very decisive in determining possession and claims of ownership." *Id.*, p. 828. "Fences are a means by which possession of land may be taken and held. They are not, however, the only means. There may be an actual possession without fences or inclosures of any kind, if it appears from other facts and circumstances that the plaintiff was exercising exclusive dominion and control over the land." *Id.*, vol. 13 p. 750. "When one is in actual possession of a portion of a given tract of land, he will be held, in law, to be in possession of the remainder, if he holds under a deed or other color of title, and there is no antagonistic or adverse possession." *Id.* "Actual possession or possession in fact exists where the thing is in the immediate occupancy of the party, or his agent

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or tenant." 28 Am. and Eng. Ency, Law, p. 238. "Constructive possession, or possession in law, as it is sometimes called, is that possession which the law annexes to the legal title or ownership of the property where there is a right to the immediate actual possession of such property, but no actual possession." Id. 239. In the notes to the page last cited we find the following: "Constructive possession is a possession in law, without possession in fact." *Hodges v. Eddy*, 38 Vt., 327. "Properly speaking constructive possession is that possession which the law annexes to the title." Citing *McColman v. Wilkes*, 3 Strob. (S. C.), 471, 51 Am. Dec., 637. "Possession which, as an inference of law, arises presumptively from the legal title, is a mere constructive possession, and is founded on the existence of title in some form." Citing *Jeffrey v. Owen*, 41 N. J. Law, 260. "Constructive possession is that which exists in contemplation of law without actual personal enjoyment or occupation." Citing *Neucome v. Crews*, 98 Ky., 339, 32 S. W., 947; *Brown v. Bolkening*, 64 N. Y., 80; *Foust v. Territory*, 8 Okl., 541, 58 Pac., 728. "Constructive possession is such a possession as the law carries to the owner by virtue of his title only, there being no actual occupation of any part of the land by anybody." Citing *Mitchel v. Bridges*, 113 N. C., 63, 18 S. E., 91; *Graham v. Houston*, 15 N. C., 232. "Constructive possession may exist without an actual *pedis possessio*, where there is a present right, and the possession is either vacant, or is consistent with the right of the owner to an immediate and actual pos-

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session by himself." Citing *Sullivan v. Sullivan*, 66 N. Y., 37.

In Cyc., vol. 1, pp. 982, 983, it is said: "That an adverse claim to land may ripen into perfect title by virtue of the statutes of limitation, it is primarily essential that the possession relied upon be actual." On page 1125 it is said: "The general rule is well settled that where a party enters, under color of title, into actual occupancy of a part of the premises described in the instrument giving color, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the lands embraced in the instrument under which he claims." In a note on page 983 it is said: "Actual possession may not consist either in an occupancy in fact of the whole tract claimed, or of an occupancy of part thereof in the name of the whole, where there is sufficient evidence of the bounds of the whole that is claimed as one entirety, and the circumstances are such that the law extends the possession of the part that is occupied to these bounds. This latter may be termed a 'virtual possession,' in order to distinguish it from the other kind of actual possession, which is called 'substantial' or '*pedis possessio*.' But whatever term may be used to give precision to the subject, the attributes which pertain to an actual possession belong to it, whether it be substantial or virtual." Citing *McColman v. Wilkes*, 3 Strob. (S. C.), 465, 51 Am. Dec., 637.

In our own case of *Hebard v. Scott*, 95 Tenn., 467, 32 S. W., 390, it was held that "the occupation of part of

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the tract, claiming the whole, under a paper title defining its boundaries, is effective possession of the whole tract under the statutes of limitation." To the same effect are *Winters v. Hainer*, 107 Tenn., 337, 64 S. W., 44; *Turnage v. Kenton*, 102 Tenn., 328, 52 S. W., 174; *Hunter v. Bills*, 3 Tenn. Cas., 97, 101; *Elliott v. Cumberland Coal & Coke Co.*, 109 Tenn., 745, 71 S. W., 749. We have one or two cases in our reports which upon casual reading would seem to indicate that there must be an inclosure of the whole tract claimed, even when the party claims under color of title; but, upon careful reading of these cases in connection with the cases cited in them (*Pullen v. Hopkins*, 1 Lea, 741; *Hicks v. Tredericks*, 9 Lea, 491), it is clear that what is meant is simply that there must be some sort of inclosure upon some part of the land, as a house, a fenced field, or other "improvement," as visible evidence of possession, where the land is capable of such use, and not that the whole tract of land must be inclosed.

The latest cases we have upon the subject of adverse possession are *Green v. Cumberland Coal & Coke Co.*, 110 Tenn., 35, 72 S. W., 459, and *Mansfield v. Northcut*, 4 Cates, 536, 80 S. W., 437, not yet printed in our official reports—both cited *supra*.

In the first of these cases it is said: "Where there is no part of the land in actual possession, the constructive possession is with the party holding the superior legal title; but, where a portion of land is in actual adverse possession, the party holding has constructive possession

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of all of the premises outside of his enclosure to the limits of his claim or assurance of title; and such constructive possession is superior to that which results merely from the ownership of the legal title, and is sufficient to put in operation the statutes of limitation to the entire tract."

In the second case it is said: "The Northcuts had actual possession of a small house upon the land occupied by Mrs. Mansfield as their tenant, claiming to the extent of the boundaries called for in their title papers. The remainder of the tract was uninclosed. A claimant of the land under a hostile title to that of defendants in error built a cabin upon a different part of the premises, and induced Mrs. Mansfield to move into it and attorn to him, and this action [forcible entry and detainer] was brought to dispossess her. Defendants in error, under these facts, had possession of the entire tract—actual possession of the house occupied by their tenant, and constructive possession of the remainder. Constructive possession of this nature, connected as it is with actual possession of a part of the premises, is of a higher character than that which follows the legal title. It will perfect a defective title, under the statute of limitations, and raise a presumption of grant, when held for sufficient periods of time. . . . We think that constructive possession of this character is sufficient to enable a claimant so holding to maintain this action."

It is perceived that the species of "constructive possession" enforced in these two cases in no wise differs

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from the "effective possession" mentioned in *Hebard v. Scott*, and the "virtual possession" mentioned in *McColman v. Wilkes*, supra, and that the attributes which pertain to an actual possession belong to it. It is further apparent that the learned justice who prepared the opinion in the cases quoted from carefully distinguished the kind of constructive possession—"effective possession" or "virtual possession"—enforced in those cases from the general constructive possession which the law attaches to the title where there is no actual possession in the owner of the title, and no one in adverse possession. It is also perceived that the learned justice differentiated this "effective possession" or "virtual possession" from technical "actual possession" merely for the sake of scientific precision or logical accuracy of thought, and that he not only did not assign to it a different office and effect from that belonging to actual possession, but blended the two and gave them the same effect; that is, treated both as constituting, in effective operation, a single possession. In so treating them, the opinions referred to not only held the court in line with its former adjudications above referred to with approval, but preserved its harmony with the overwhelming weight of authority in this country upon the special phase of the question herein considered, as shown by the excerpts which we have made from the text-books quoted above, and as exhibited by the vast number of cases cited in the notes on the pages referred to.

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The substance of the whole matter, as applied to the present controversy, is that the defendants in error being in actual possession of a part of the tract on which the timber grew, by their tenant living in a house built upon the tract, holding under color of title, and claiming the land as their own at the time the timber was felled and the logs taken away, their possession extended to the limits or boundaries contained in their title papers, which covered the space where the trees grew. This possession was the "effective possession" or "virtual possession" described above, and was an "adverse possession," in the sense in which that term is used in the law. Being thus in adverse possession of the land, they were likewise in adverse possession of the timber which grew upon it, and, when it was felled and the logs hauled away, these logs were taken from their possession; and, within the authorities cited, and under the principles stated, they were entitled to pursue the logs by the appropriate possessory action (replevin), and to sustain the action they did not need to go further than prove their status as above outlined, and the taking, without deraining title or going into a controversy with the person taking the logs concerning the true title to the land.

Any other view would place the court in the novel position of holding that one in adverse possession of land, claiming under color of title, may recover the land itself from a trespasser by a possessory action, but must bring ejectment for timber cut from it, or (the same

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thing, in substance) must sustain his possessory action for the timber (replevin) by the character of testimony required only in ejectment cases.

So, recurring to the special point previously mentioned, we conclude that the deed of the Cumberland Coal & Coke Company, even if admitted in evidence, could not protect Hizar Beaty's estate against recovery in the present action.

It is insisted by the plaintiffs in error that his exception to the two Gernt deeds above referred to should have been sustained. We do not think so. The exceptions were, in substance, that those two deeds did not describe any land. This is a mistake. They refer to the grant by its number, and it describes the land. "*Id certum est quod certum reddi potest.*"

It is insisted that the defendants in error do not show a right to the possession of any interest in the logs sued for, and that there can be no recovery in replevin in such a case. To this it need only be replied that the whole possessory right is shown to be in Bruno Gernt. It is immaterial to the plaintiffs in error if he join others with him in the suit, and share his recovery with them.

It is said that, after the date of his deeds above referred to, Bruno Gernt executed a deed to Sydney Beckwith to an undivided 450-acres interest in the land covered by grant No. 3329, and that it does not appear but that the logs in question, or some of them, were cut from said Beckwith's land. This is an immaterial matter to

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the plaintiffs in error, since Beckwith joined in the suit below.

It is said that part of the logs in question were cut from the land of Marion Stephens, and part from the land claimed by the defendants in error, and that it is impossible to distinguish them. This is immaterial, also, since it appears that Marion Stephens transferred his right in the logs, whatever it might be, to the defendants in error prior to the bringing of the suit below.

The foregoing sufficiently disposes of the real matters in controversy, and we need not refer to or consider the other errors assigned. It results that the judgment of the court below must be affirmed.

DISSENTING OPINION.

MR. JUSTICE WILKES delivered the following dissenting opinion: I do not concur with the majority opinion.

There is no principle better established than that in an action of replevin the plaintiff must show either a general or special property or ownership in himself.

In *Parham v. Riley*, 4 Cold., 5, it is said:

“The purpose of the action of replevin is to recover in specie the personal chattel which has been taken and detained from the owner’s possession.

“Under the plea of not guilty, it is competent for the defendant to show that the title to the property replevied is not in the plaintiff, but in himself or in a third person, and thereby defeat the action. The plaintiff cannot succeed unless he prove either a general or special property

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in himself. Hence property acquired by robbery does not vest such title in the trespasser as will authorize him to maintain the action."

Under the plea of not guilty, in an action of replevin, "the material inquiry is as to the property of the plaintiff, which he must be prepared to prove. If this issue is found against him, that is, that the property is not in him, he cannot succeed." 2 Greenleaf on Evidence, 563.

"The plaintiff cannot succeed, then, unless he is prepared to prove either a general or special property in himself, and will be defeated if the proof shows the right to the property and possession is in a stranger, etc.

"It is enough for this case to say that the present defendant has a right to show that the plaintiffs have no title, or that the legal title to the property is outstanding in any one else; and, if he succeeds in doing so, the plaintiff must be defeated." *McFerrin v. Perry*, 1 Sneed, 316.

In the case at bar the plaintiff is relieved by the majority from showing property or title in himself, and his right to recover is made to depend upon constructive possession, although actual possession would not suffice unless the right to that possession is shown by the proof. See, also, *Callicr v. Yearwood*, 5 Baxt., 581.

To the same effect is *Hart v. Vinsant*, 6 Heisk., 618. In that case it is said: "Situated as the trees were out of which the rails were made—the land lying uninclosed and therefore not in the actual possession of either party—it became a legitimate and necessary inquiry to

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ascertain upon whose land they stand, not for the purpose of trying the title to the land, but as a means of determining the right to the possession of the rails when made."

In *Clement v. Wright*, 40 Pa., 250, it is said: "In the absence of any actual adverse possession of wild timber land, the law casts the possession on the owner; and proof of title was therefore admissible, not for the purpose of trying the title, but to prove possession in the rightful owners, which possession defendant had acquired by purchase. To the extent that it was legitimate and necessary to inquire into the ownership or right of possession of the rails, it was incumbent on both parties to adduce the best evidence of title. It was also erroneous to exclude the title papers of defendant."

The action of replevin is based upon the trespass in the taking, and in such actions of trespass the plaintiff must show an actual possession or a valid title in himself to the premises in dispute. *Snoddy v. Kreutch*, 3 Head, 303; *Large v. Dennis*, 5 Sneed, 597.

The title required in cases of replevin is the same as in actions of trover. Cobbey on Replevin, section 89.

When a plaintiff is in actual possession, he need not deraign his title, as against a naked trespasser. *Large v. Dennis*, 5 Sneed, 597.

"But constructive possession can never be determined to be in any other than the legal owner of the premises. . . . Therefore the plaintiff in this action, where brought for a casual trespass to wild and unoccu-

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pied lands, must show title to the premises." *Polk v. Henderson*, 9 Yerg., 310; *Douling v. Hickman*, 4 Hayw., 170; *West v. Lanier*, 9 Humph., 771; *Bailey v. Massey*, 2 Swan, 168.

As we understand the opinion of the majority, any person having constructive possession, but not actual occupancy, of premises, may bring an action of replevin for timber cut.

If so, then, in case of an interlap or any other conflict of title, in which both parties have possession of part and title papers for the remainder, either party may bring replevin against the adverse claimant, without showing title and ownership, because each has constructive possession of the same grade and dignity.

In addition, it is a solecism to speak of constructive possession which is not based upon ownership and title, for, in order to show constructive possession, title and ownership must appear as its basis.

The correct doctrine, as I understand it, is that a party in actual possession or occupancy of land, as when it is inclosed, etc., may maintain replevin against a naked trespasser who does not claim title. But where there are two parties claiming title to land, and neither in occupancy, neither may maintain replevin for timber cut on the disputed premises, and certainly not without showing "ownership," which in the case of real estate is synonymous with "title," and title cannot be tried in an action of replevin. As is said in *Cobbey on Replevin*, section 376:

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"In replevin for logs cut and removed by defendants from land to which plaintiff claims title, proof that the plaintiff was in actual possession and occupancy of the land at the time of such cutting and removal is sufficient to enable him to maintain the action, without proof of a paper title, unless the defendants prove an adverse title thereto of a higher character than a mere possessory title. But where the land was unoccupied when the logs were taken, plaintiff must show that he is the real owner, and trace his title to the government. Where a trespasser settled on timber land for the purpose of cutting the timber thereon, such settlement does not constitute him an adverse claimant, and the true owner may bring replevin for the logs and the timber so cut."

To the same effect, see, also, 24 Am. & Eng. Ency. Law (2d Ed.), 486, section 8; *Hungerford v. Redford*, 29 Wis., 345; *McNarra v. Chic. & N. W. R. R.*, 41 Wis., 69; *Wadleigh v. Marathon, etc.*, 58 Wis., 516, 17 N. W., 314.

The majority opinion refers to Cobbey on Replevin, sections 353, 374, 375, 376, 382; and section 353 is copied, which explicitly and directly supports this dissent, by stating, in substance, that, where there are adverse claimants to land, replevin will not lie for timber cut by one of them.

Section 376 we have already copied. The gist of that section is that, when the land is unoccupied when the logs are taken, the plaintiff must show that he is the real owner, and trace his title to the government.

So in section 354 it is said: "When the land is wild

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and uninclosed, the plaintiff must show a good legal title, as constructive possession follows the legal title." *Johnson v. Elwood*, 53 N. Y., 431.

To the same effect is *Hart v. Vinsant*, 6 Heisk., 616.

In *Hungerford v. Redford* and another, 29 Wis., 345, it is said:

"Action to recover the possession of a quantity of pine logs, alleged to have been cut by the defendants on a certain tract of land belonging to the plaintiff, and by them removed therefrom. The complaint is in the usual form. The answer is a general denial, and an averment that the land upon which the logs were cut and from which they were removed belongs to the defendants.

"The plaintiff recovered judgment in the circuit court, from which the defendants have appealed.

"(1) It appears by the evidence that the land from which the logs were taken was unoccupied, and it was therefore necessary that the plaintiff should prove that he was the owner thereof before he could recover the logs.

"The owner of the land is the owner of the logs and entitled to the possession of the same.

"To prove his title to the land, the plaintiff gave in evidence a conveyance thereof executed by Eli P. May and wife to Wm. B. Ogden, dated January 21, 1857; also conveyances of the same land executed by Ogden to Flagg, by Flagg to Rumsey, and by Rumsey to the plaintiff. The latter of these conveyances is dated August 17, 1868. This is all of the testimony relating to plaintiff's title to the land, and it is clearly insufficient. It

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fails entirely to show that May or any other grantor in either of the above-mentioned conveyances had any title to the land, and hence fails to show that the plaintiff has title thereto.

"A merely colorable title in the plaintiff is not alone sufficient to entitle him to judgment in an action like this, where, as in this case, the land is unoccupied. Had he been in the actual possession and occupancy of the land when the logs were cut, he could have maintained this action without making any proof whatever of a paper title, unless the defendants proved an adverse title thereto of a higher character than a mere possessory one. But the plaintiff was not in actual possession of the land when the logs were cut, which was in winter of 1868-69; and he shows no title in himself to the land, except one which is merely colorable.

"If the plaintiff is not the real owner of the land, and the defendants shall be compelled to pay the judgment which he recovered against them in the circuit court, what rule of law will prevent such owner from bringing an action against them for the same logs, and recovering therein? No such rule has been contended for in this case, and we are not aware that there is any such rule. The fact that a recovery by the holder of a merely colorable title is no bar to a recovery by the real owner demonstrates that none but the real owner can recover."

In *McNarra v. Chicago & Northwestern Ry. Co.*, 49 Wis., 74, it is said:

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"The title necessary to be proved in order to maintain the action is the same as in an action of trespass *quare clausum fregit*, or in replevin for timber cut and removed by a trespasser from the lands of the plaintiff. In either case, if the lands upon which the trespass was committed were vacant and unoccupied, the plaintiff must prove his title thereto, or he cannot recover. But if he was in the actual possession and occupancy of the land when the trespass was committed, he may maintain trespass or replevin, according to the exigencies of the case, without making any proof of a paper title, unless the defendant prove an adverse title thereto of a higher character than a mere possessory one. *Hungerford v. Redford*, 29 Wis., 345.

"In this case the plaintiff showed himself in actual possession of the land at the time of the injury, and the defendant did not show or attempt to show any outstanding adverse title thereto. Hence the plaintiff's possession was sufficient to sustain the action, and he was not required to establish a higher or better title."

In the present case there is a claim of title by both parties. Neither is in actual possession or occupancy. Both are in constructive possession. According to the majority, each would have a right to replevy from the other, and no inquiry of ownership or title is allowable.

One may have a slightly higher grade of constructive possession, but this could only be determined by a comparison of titles, which is not allowed.

Both have constructive possession, and, under the op-

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inion of the majority, each may maintain replevin, but neither is required to show ownership or title on which constructive possession is based.

This is a new doctrine, not supported by reason or authority, and I most respectfully dissent from such holding.

In dissenting, I controvert none of the authorities cited by the majority, but, so far as they are applicable, they support the view expressed in this dissent.

The majority hold that title cannot be inquired into, and at the same time proceed to inquire into the title to see whether the plaintiff has constructive possession. Not only so, but they pass upon defendant's title and pronounce it champertous.

As to the difference between actual and constructive possession, and the different grades of constructive possession, the mass of authorities cited by the majority is wholly unnecessary. The entire subject is fully, ably, and exhaustively discussed in *Green v. Cumberland Coal & Coke Co.*, 110 Tenn., 35, 72 S. W., 459, but I think much of the reasoning of the majority opinion in this case is in conflict with the holding in the *Cumberland Coal & Coke Case*.

The case of *Mansfield v. Northcut*, 4 Cates, 536, 80 S. W., 437, holds that constructive possession is sufficient to sustain the action of forcible entry and detainer. But the action of forcible entry and detainer is maintained upon grounds different from an action of replevin. The

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only question in an action of forcible entry and detainer is one of possession.

Title or ownership is not necessary to be shown. Only two questions are inquired into, viz:

- (1) Who was in possession?
- (2) How was that possession lost?

Davidson v. Phillips, 9 Yerg., 95, 30 Am. Dec., 393.

A trespasser who has no title whatever may recover from the true owner if his possession is disturbed. *Davidson v. Phillips*, 9 Yerg., 95, 30 Am. Dec., 393.

And the statute expressly provides that in such actions the estate or merits of the title shall not be inquired into. Shannon's Code, section 5103.

But in replevin, ownership and right to possession must be shown, and not mere actual possession alone. *McFerrin v. Perry*, 1 Sneed, 317, and other cases cited, *supra*.

But I will pursue the matter no further; simply contenting myself with the statement that I am of the opinion the cases cited by the majority opinion do not lead to the result reached, but to the contrary.

I cite in support of this dissent the following authorities relied on by the majority: 24 Am. & Eng. Ency. Law, 486; Cobbey on Replevin, sections 353, 376, and other sections; *Cooper v. Watson*, 73 Ala., 252, 255; *Anderson v. Hapler*, 34 Ill., 436, 439, 85 Am. Dec., 318, and cases cited; *Stockwell v. Phelps*, 34 N. Y., 363, 90 Am. Dec., 710; *Page v. Fowler*, 28 Cal., 605, 610; *Rees v. Higgins*, 9 Kan. App., 832, 834, 61 Pac., 500; *Hart v. Vinsant*, 6 Heisk., 616, directly in point.

Chemical Co. v. Henry.

TENNESSEE CHEMICAL COMPANY v. T. A. HENRY.

(*Nashville.* December Term, 1904.)

1. **LANDOWNERS.** Not required to keep their premises safe for trespassing animals by inclosures or otherwise.

Landowners are under no obligation to keep their premises safe for trespassing animals belonging to others, but the owners of animals must, at their peril, keep them off the land of others, and whether such lands are inclosed or not is immaterial.

Cases cited and approved: Knight v. Abert, 6 Pa., 472; Rust v. Low, 6 Mass., 94; Hess v. Lupton, 7 Ohio, 216, pt. 1; Bush v. Brainard, 1 Cow., 79; Hughes v. Railroad, 66 Mo., 325; McGill v. Compton, 66 Ill., 327; Herold v. Meyers, 20 Iowa, 378; Walker v. Herron, 22 Tex., 55.

2. **SAME.** Same. Not liable for unsafety of premises causing injuries to trespassing animals, if not an attractive nuisance; case in judgment.

The owner of a shed inclosed except for a railroad track is not liable for the death of a cow straying therein caused by her eating sacks, which had contained nitrate of soda, stored in said shed, especially where the premises were not in any sense an attractive nuisance, the maintenance of which would make the owner liable for injuries sustained by trespassing animals.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.—
J. A. CARTWRIGHT, Judge.

Chemical Co. v. Henry.

W. E. STEGER and W. C. CHERRY, for Chemical Co.

ALFRED T. LEVINE, for Henry.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is an action to recover damages for the death of a cow, valued at \$60, caused by alleged wrongful act.

Plaintiff in error, engaged in the manufacture of commercial fertilizers in the suburbs of the city of Nashville, stored sacks which had contained nitrate of soda, used by it in its business, in an open shed upon its premises, which were inclosed, save an opening for the entrance of cars bringing material and carrying out fertilizer. The cow of the defendant in error entered this inclosure, presumably along the railroad track, and, unobserved by the company's employees, ate some of these sacks and the particles of soda left in them, which unusual diet created violent internal disturbances, causing her death. This suit was brought to recover her value from the plaintiff in error upon the theory that it was guilty of negligence in not fencing its premises, so as to prevent stock running at large from becoming poisoned by eating its property there stored.

The trial judge, disposing of the case without a jury, gave judgment in favor of the plaintiff in the lower court, and the chemical company appeals and assigns error.

The owners of lands are under no obligation to keep

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their premises safe for trespassing animals belonging to others, but the owners of animals must at their peril keep them off the lands of others, and whether such lands are inclosed or not is immaterial.

Judge Thompson, in his work on Negligence, 298, says: "A landowner is not liable for failure to keep his premises safe for trespassing animals. If cattle stray upon uninclosed lands and injure themselves by eating deleterious matter, which has been left there by the landowner without any malicious intent, the landowner is not liable to the owner of the cattle."

In the case of *Knight v. Abert*, 6 Pa., 472, 47 Am. Dec., 478, it is said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risk incident to it." And in *Rust v. Low*, 6 Mass., 94, it is said: "It is a general rule of the common law that the owner of cattle is bound at his peril to keep them off the lands of other persons, and he cannot justify or excuse such an entry by showing that the land was unfenced. Fences were designed to keep one's cattle at home, and not to guard against the intrusion of those belonging to other people." Other cases in accord are *Hess v. Lupton*, 7 Ohio, 216, pt. 1; *Bush v. Brainard*, 1 Cow., 79, 13 Am. Dec., 513; *Hughes v. Railroad Co.*, 66 Mo., 325; *McGill v. Compton*, 66 Ill., 327; *Herold v. Meyers*, 20 Iowa, 378; *Walker v. Herron*, 22 Tex., 55.

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Nor were the premises of the chemical company in any sense an attractive nuisance, the maintenance of which made it liable for injuries sustained by trespassing animals.

There is no evidence to sustain this judgment, and it is reversed, and the suit dismissed with costs.

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JAMES HADLEY *et al.* v. JOHN HADLEY *et al.*

(Nashville. December Term, 1904.)

1. TAXATION. Lien against whole estate, including remainder estate, though land is assessed to life tenant only.

Our statutes (Acts 1897, ch. 1, secs. 4 (1), 27; 1899, ch. 435, secs. 5 (1), 33; 1901, ch. 174, secs. 5 (1), 32; 1903, ch. 258, secs. 5 (1), 32) create a lien for taxes against the whole estate, including the remainder estate, although the land is assessed to the life tenant only, and thus change the previously existing law. (*Post*, pp. 158-163.)

Acts cited and construed: 1897, ch. 1, secs. 4 (1), 27; 1899, ch. 435, secs. 5 (1), 33; 1901, ch. 174, secs. 5 (1), 32; 1903, ch. 258, secs. 5 (1), 32.

Cases cited and approved as to previously existing law: *Ferguson v. Quinn*, 97 Tenn., 48.

2. SAME. Same. Statutes providing for assessment of mineral, timber, and other interests in land do not require a remainder estate to be assessed separately to the remainderman.

Our statutes (Acts 1895, ch. 120, sec. 6 (7); 1897, ch. 1, sec. 4 (6); 1899, ch. 435, sec. 5 (5); 1901, ch. 174, sec. 5 (5); 1903, ch. 258, sec. 5 (5), providing for the assessment of all mineral, timber, and other interests in real estate to the owner thereof, to be assessed as real estate, have no application to lands other than those containing mineral, timber, and other like interests owned separately from the general freehold, and do not require that the remainder estate in land shall be assessed to the remainderman. (*Post*, pp. 163, 164.)

Acts cited and construed: 1895, ch. 120, sec. 6 (7); 1897, ch. 1, sec. 4 (6); 1899, ch. 435, sec. 5 (5); 1901, ch. 174, sec. 5 (5); 1903, ch. 258, sec. 5 (5).

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3. SAME. Statutes making taxes assessed to a life tenant a lien on remainder estate are constitutional.

Our statutes (Acts 1897, ch. 1, secs. 4 (1), 27; 1899, ch. 435, secs. 5 (1), 33; 1901, ch. 174, secs. 5 (1), 32; 1903, ch. 258, secs. 5 (1), 32, creating a lien against the remainder estate, where the land is assessed to the life tenant, are not repugnant to the provisions of our State and federal constitutions (State const., art. 2, sec. 28; art. 1, sec. 8; U. S. const., 14th am.) requiring all property to be taxed according to its value, and forbidding the deprivation of property without due process of law. (*Post*, pp. 159-175.)

Acts cited and construed: 1897, ch. 1, secs. 4 (1), 27; 1899, ch. 435, secs. 5 (1), 33; 1901, ch. 174, secs. 5 (1), 32; 1903, ch. 258, secs. 5 (1), 32.

Constitution cited and construed: Art. 1, sec. 8; art. 2, sec. 28; U. S. const., 14th am.

Cases cited and approved: *Whyte v. Nashville*, 2 Swan, 364; *Anderson v. Hensley*, 8 Heis., 834; *Nashville v. Cowan*, 10 Lea, 209; *Stovall v. Austin*, 16 Lea, 700; *Ferguson v. Quinn*, 97 Tenn., 46; *Thorington v. Montgomery*, 88 Ala., 548, 553; *Veredry v. Dotterer*, 69 Ga., 194, 198; *Dunlap v. Gallatin Co.*, 15 Ill., 7, 9; *Sinclair v. Learned*, 51 Mich., 335, 344; *Lacey v. Davis*, 4 Mich., 140; *Watkins v. Green*, 101 Mich., 493, 498; *Chaplin v. United States*, 29 Ct. Cl., 231, 233; *Jones v. Randle*, 68 Ala., 260; *Insurance Co. v. Lott*, 54 Ala., 499; *Mayor v. Baldwin*, 57 Ala., 61; *Land Co. v. Ayres*, 62 Ala., 413; *Bank v. Mobile*, 62 Ala., 284; *Underhill v. Calhoun*, 63 Ala., 216; *State v. Mining Co.*, 14 Nev., 221; *O'Grady v. Barnhisel*, 23 Cal., 294; *State v. Sergeant*, 76 Mo., 557; *Hayden v. Foster*, 13 Pickering, 494; *Thompson v. Carroll*, 24 How., 422; *In re Page*, 60 Kan., 842; *Stevens v. Railroad*, 13 Blatchf., 104; *Nichol v. Ames*, 173 U. S., 509; *Hinehman v. Morris*, 29 W. Va., 673; *Short v. State*, 80 Md., 392; *Appleton v. Hopkins*, 5 Gray, 530; *Cummings v. Cummings* (C. C.), 91 Fed., 602; *Moore v. Byrd* (N. C.), 23 S. E., 968; *Oster-*

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berg v. Trust Co., 93 U. S., 424; Atkins v. Hinman, 7 Ill., 437-439, 449.

4. **SAME.** Penalty on taxes against life tenant do not attach to remainder estate for nonpayment by life tenant.

The remainder estate is not liable for the penalty prescribed by statute for the nonpayment of taxes, where assessed to life tenant and not paid by him, although such remainder estate is liable for the taxes. (*Post*, pp. 175, 176.)

Acts cited and construed: 1897, ch. 1, secs. 59, 66; 1899, ch. 435, sec. 50; 1901, ch. 174, sec. 49; 1903, ch. 258, sec. 49.

FROM DAVIDSON.

Appeal and writ of error from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

ATTORNEY-GENERAL CATES, for the State.

SAMUEL N. HARWOOD, for Davidson County.

N. D. MALONE, for Robert L. Hadley's heirs.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The general question presented on this record is whether, under the assessment laws of the State, the remaindermen under the will of John L. Hadley who died in 1870, are liable for the State, county, and city taxes assessed to Robert L. Hadley, the life tenant.

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The chancellor so decreed, and the remaindermen appealed.

The facts presented on the record are that Robert L. Hadley, under the will of his father, J. L. Hadley, was the life tenant of several tracts of land in the fourth civil district of Davidson county and in a house and lot in the city of Nashville. The life tenant died July 10, 1904, owing about \$1,820 of taxes, interest, penalties, and costs accumulated since 1892, and which taxes were assessed to Robert L. Hadley, the life tenant. The remaindermen have now come into the possession of said property under the will of their grandfather, John L. Hadley, deceased, and find this accumulation of taxes.

A partition bill was filed by some of these remaindermen for a division of said property, and the chancellor held that the property was incumbered by a lien for the life tenant's taxes, amounting to about \$1,820.11, less \$208 penalties and \$28 taxes for the year 1892, which accrued before passage of the act of 1897. Prior to Act 1897, p. 5, c. 1, the property was assessed in the name of the owner, for the payment of which his personalty was liable, and should be subjected before resorting to the realty. The taxes, under that system, were assessed to the life tenant in possession, and the life estate was liable for their payment. *Ferguson v. Quinn*, 97 Tenn., 48, 25 S. W., 576, 33 L. R. A., 688.

In the latter case it was held that neither a remainder estate nor its owner is liable under our statutes for taxes accrued against land during the existence of the

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life estate. The life estate and its owner are alone subject to this burden. The tax lien attaches to the life estate alone, and the sale for taxes affects only the life estate. The life tenant is the owner of lands for purposes of taxation.

It was further held under that system of taxation that the payment by remaindermen of taxes for which the life estate and its owner are alone liable is officious, and the amount cannot be recovered or enforced against the life estate by suit.

It was further held that remaindermen cannot maintain a bill *quia timet* to impound the rents of land and compel their application to the payment of delinquent taxes that have accrued during the life estate, or to sell the life tenant's interest for that purpose.

The broad insistence now made is that the present owners, being merely remaindermen until the decease of said Hadley on July 10, 1904, are not liable for said taxes, nor are said taxes a lien upon their interests in the remainder.

It is conceded on behalf of the State that the case of *Ferguson v. Quinn* would be determinative of the question herein involved but for the enactment of subsequent statutes. It is said that in order to remedy the holding of this court in *Ferguson v. Quinn*, decided at Jackson in the April term, 1896, the general assembly, at its next session, changed the method of assessment and the nature of the lien imposed by the tax.

Chapter 1, p. 5, Acts 1897, after providing that prop-

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erty should be assessed to the person or persons owning or claiming to own the same on the 10th day of January for the year the assessment should be made, if they were known, and, if not known, then to unknown owners, in section 27 enacted as follows:

“That the assessed taxes on all real estate, railroad, telegraph and telephone companies, and all damages and costs accruing thereon shall be and remain a first lien upon such property from the 10th of January of each and every year, for the taxes for that year; and said taxes shall be a lien upon the fee in said property, and not merely upon the interests of the person to whom said property is, or ought to be assessed. Said lien shall attach not only to the interest of the person to whom the property is, or ought to be, assessed, but to any and all other interests in said property, whether in reversion or remainder, or lienors, or of any nature whatever, and the whole proceeding for the collection of taxes, from the assessment to the sale for delinquency, shall be a proceeding *in rem*, and shall not be invalid on account of such land having been listed or assessed for taxation in any other name than that of the original owner.”

This system of taxation was re-enacted in 1899, p. 1115, c. 435, section 33; 1901, p. 336, c. 174, section 32; 1903, p. 663, c. 258, section 32.

It is therefore insisted on behalf of the State that it was the intention of the general assembly, since the passage of the act of 1897, that the tax should be assessed

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and constitute a lien upon the land itself, and not merely upon an interest therein.

It is insisted on behalf of the appellants that the State has made no provision for the assessment of the remainder interest in these lands, but has assessed the entire value of the land to the life tenant. It is true that the entire assessment in this case was made against John L. Hadley, the life tenant. Section 4 of the act of 1897, and subsequent acts provide that property shall be assessed to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment is made, if known; but section 27 of the act of 1897, and subsequent acts, provide that the taxes shall constitute a lien upon the fee in said property, and not merely upon the interest of the person to whom said property is, or ought to be, assessed. Further, that the lien shall attach not only to the interest of the person to whom the property is or ought to be assessed, but to any and all other interests in said property, whether in reversion or remainder, or of lienors, or of any nature whatever, and the whole proceeding for the collection of taxes from the assessment to the sale for delinquency shall be a proceeding *in rem*, and shall not be invalid on account of such land having been listed or assessed for taxation in any other name than that of the original owner.

This case does not violate the rule which requires an assessment before taxation, for the property was all assessed to the life tenant, but under the express provis-

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ions of the act the lien for taxes attached to the entire fee, and thus the remainder interest in the property became liable for the payment of the taxes. The act expressly declares that the proceeding for the collection of the taxes is *in rem*—that is to say, against the property itself—and it is wholly immaterial who are the owners of the separate interests in the property. The purpose of the legislature obviously was to prevent the loss of State, county, and city revenue by the death of the life tenant, because, as already seen, under former decisions of this court it was the duty of the life tenant to keep down the taxes, and the remainder interest in the property was not liable for delinquent taxes due from the life tenant. When, therefore, the life tenant died without having paid the taxes, they became lost to the State.

It is said, however, that the State has provided for the assessment of the interests of the remaindermen to the owners thereof by virtue of subsection 6, section 4, c. 1, p. 7, Acts 1897, as follows:

“That hereafter all mineral, timber or other interests in fee in real estate in this State, owned separate from the general freeholder shall be assessed to the owner thereof, separate from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real estate.”

This subsection was amendatory of subsection 7 of section 6, p. 205, c. 120, Acts 1895, as follows:

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"That hereafter all mineral and timber interests in land in this State purchased by individuals or corporations shall be taxed as real estate."

It will be observed that the act of 1895 only provided that mineral and timber shall be assessed as real estate, while the amendatory act of 1897 added "other interests in fee in real estate owned separate from the general freehold shall be assessed to the owner thereof," meaning, of course, other interests of like character, *ejusdem generis*, and the other interests in the land shall be assessed as real estate to the owner thereof. But this section, *ex vi termini*, only applies to the assessment of minerals, timber, and other like interests. It was not the object of the legislature by this section to provide for a separate assessment of all interests in land to the respective owners thereof, but only for separate assessment of land containing mineral, timber, and other like interests. Hence it has no application in the present case, since it is not shown that this land contains minerals, timber, or other like interests, which is owned separately from the general freehold.

In the note to *Ferguson v. Quinn*, reported in 33 L. R. A., 688, the learned annotator has presented a very valuable collection of authorities bearing on this point.

"Under the Alabama statute, and prior to the Code of 1886, a sale of land for unpaid taxes was a sale of the fee simple, and not of the taxpayer's interest only. *Thorington v. Montgomery*, 88 Ala., 548, 553, 7 South., 363. In this case the court stated that the failure to pay

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taxes by a tenant for life, or by some one for him, might result in the loss of the entire estate, and that the tax assessed was a charge and lien on the land itself, as well as a legal liability resting on the taxpayer.

"So, in *Veredry v. Dotterer*, 69 Ga., 194, 198, where the contest was between the purchaser under a tax *fi. fa.* and a mortgage *fi. fa.* creditor, the purchaser interpleading the mortgagee's levy upon the land, the court stated:

" 'Taxes due the State are not only against the owner, but against the property also, and that without reference to judgments, sales, mortgages, transfers, or incumbrances of whatsoever nature or effect. The only concern as to an owner at all is merely to know against whom the assessment is to be made, whilst the tax itself and the lien therefor are against the property. The State's lien for taxes overrides all others, and follows the property into the hands of whomsoever it may go. If the property itself is subject, it must pay the taxes for which it is liable, regardless of the interest of any and all persons therein.'

"So, in Illinois, the courts have stated that a tax judgment is against the land, and not against a particular individual. The land itself is sold, and not a particular interest in it. If the land is subject to taxation, and the proceedings under the revenue laws have been regular, and the owner has failed to redeem within the time limited by the law, then the whole legal and equitable estate is vested in the purchaser. A new and perfect title is established. This results from the paramount authority of

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the State to levy taxes on property within its limits and coerce the payment by subjecting the property to sale. *Atkins v. Hinman*, 7 Ill., 437, 449, where the purchaser succeeded in ejectment proceedings against one in possession claiming as heir.

"The same doctrine is held in the latter case of *Dunlap v. Gallatin County*, 15 Ill., 7, 9.

"Under the Michigan tax system every sale of lands is a sale of the complete title, and, if legal, all prior titles are cut off by it. *Sinclair v. Learned*, 51 Mich., 335, 344, 16 N. W., 672—an action of ejectment by the purchaser at a tax sale against one claiming under mortgage foreclosure sale.

"In *Lacey v. Davis*, 4 Mich., 140, 66 Am. Dec., 524, 529, it is stated:

"The State, for the support of the government, in the exercise of its eminent domain, imposes the burden of taxation upon all persons and property within its limits. If such taxes are not paid, and real estate be the subject of taxation, it condemns the land for the default, and this condemnation is wrought out by its sale. The title acquired by such sale has nothing to do with the previous chain of title, nor does it in any manner connect itself with it. It is a breaking up of all titles and operates not to support, but to destroy, them.'

"That such doctrine applies to the case of a reversion or a remainder appears clear, as in a later case the court held that, where the owner of a life estate neglects to pay the taxes assessed upon the land, and it is sold for

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valid taxes and under valid proceedings, title passes to the grantee, and the only remedy of the remaindermen is against the life owner. *Watkins v. Green*, 101 Mich., 493, 498, 60 N. W., 44.

"All proceedings under the Ohio statute for the sale of land for the nonpayment of taxes are *in rem*, and not *in personam*, and operate upon the land itself, and not merely upon the title of the person in whose name it may have been listed for taxation; the Ohio statute (section 39) declaring that the deed shall vest in the grantee, his or her heirs or assigns, a good and valid title both in law and in equity; and therefore a valid title extinguishes all previous titles, legal or equitable, inchoate or perfect, and the purchaser takes the premises discharged from all previous liens and incumbrances.

"In *Chaplin v. United States*, 29 Ct. Cl., 231, 233, the remainderman sought to recover against the government under the act of March 2, 1891, chapter 496, 26 Stat., 822, land that had been sold through the negligence of the life tenant in not paying taxes, and in denying relief the court said:

"'Although it is the duty of the tenant for life to pay the taxes, the law does not protect the estate of remaindermen and reversioners from the consequence of a forfeiture of the land to the State in case of a sale for taxes.'"

See, also, *Nashville v. Cowan*, 10 Lea, 209.

It is said in the case at bar that under this construc-

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tion of the law the land of the remaindermen is burdened with a lien constantly increasing, and which may render the use and enjoyment of the property valueless. It may be said, however, in answer to these suggestions, that under a proper construction of the act of 1897 and subsequent legislation the life tenant is still charged with the duty of keeping down taxes, and upon his failure to do so the remaindermen may, by proper legal proceedings, force him to do so by paying the taxes themselves and seeking subrogation to the State, county, or city lien for reimbursement, or, if necessary, file a bill *quia timet* to impound the rents of land and compel their application to taxes during the currency of the life estate, or to sell the life tenant's interest for that purpose. 2 Cooley on Taxation, p. 818.

This remedy was not open to remaindermen prior to the act of 1897, since under the system of taxation then prevailing the taxes constituted no lien on the remainder interest, as decided in *Ferguson v. Quinn*, 97 Tenn., 46, 36 S. W., 33 L. R. A., but under the present system, which has been in operation since 1897, the entire fee is burdened with the lien.

It was not the purpose of the act of 1897, nor of subsequent acts, to break down the rule so long established in this State that the life tenant is charged with the duty of keeping down taxes. The reason of the rule is that the life tenant is in the possession and enjoyment of the rents and income of the property, and is its ostensible owner. *Whyte v. Nashville*, 2 Swan, 364; *An-*

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derson v. Hensley, 8 Heisk., 834; *Nashville v. Cowan*, 10 Lea, 209; *Stovall v. Austin*, 16 Lea, 700; *Ferguson v. Quinn*, 97 Tenn., 46, 36 S. W., 576, 33 L. R. A., 688.

But the purpose of the present legislation was to extend the tax lien to the whole fee in the land. The act recites that said lien shall attach not only to the interest of the person to whom the property is or ought to be assessed, but to any and all other interests, whether in reversion or remainder. The act further declares that the whole proceeding for the collection of taxes from the assessment to the sale for delinquency shall be a proceeding *in rem*. The plain mandate of the State constitution is that "all property shall be taxed according to its value," and when the tax is laid upon the property itself it is not illegal from the fact that the interests of life tenants and remaindermen are not assessed separately. Mr. Cooley, in his work on Taxation, volume 2, page 960, says:

"Observing the statutory directions and precautions, and the principles of common law and of public policy, to which reference has been made, the officer may transfer to the purchaser the full interest in the land which has been assessed, and may convey a complete and perfect title, if such is the provision of law on the subject, as in many States is the case. Indeed, as the chief justice of Massachusetts says in a recent decision, 'The prevailing opinion seems to be that a tax title is a new title, and not merely the sum of old titles.' Where the whole title is sold it cuts off and divests estates in re-

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mainder or reversion, rent charges, trust estates, homestead interests, mortgages, and other incumbrances, and even back taxes and tax titles, unless other provision is made; but in some States the sale is only of the title which the person taxed had at the time, while in others nothing passes but the title and interest of the parties who were made defendants to the judicial proceedings anterior to the sale. Where the distinct interests of different owners are assessed separately, a sale of the land for a tax against one does not cut off the interests of others. Title to the land of an infant may be passed by the sale. Statutes sometimes provide for selling a leasehold interest in lands; the person taking them who will pay taxes and charges for the shortest term of years. And it is said to be a matter of legislative discretion whether a purchaser at a tax sale shall have an absolute title or a life estate."

Mr. Desty, in his work on Taxation, page 746, says:

"The government cannot wait on slow and tedious processes for the collection of its revenue, and hence the rules and rulings, statutory and otherwise, which have established a separate and peculiar system for the assessment and collection of taxes, and for testing the legality of the assessment. . . . The revenue laws have given two remedies to enforce by action the collection of delinquent taxes—one against the person and the other against the property; and neither depends upon the other for its existence or efficiency. . . . The provision of the revenue act which authorizes the

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enforcement of a lien against the land without any personal judgment against the owner is constitutional. Where the tax is imposed on the property as such, without reference to ownership, the proceedings to enforce payment of the tax are against the land itself for the tax due thereon." *Jones v. Randle*, 68 Ala., 260; *Ala. G. L. Ins. Co. v. Lott*, 54 Ala., 499; *Mayor v. Baldwin*, 57 Ala., 61, 29 Am. Rep., 712; *Elyton Land Co. v. Ayres*, 62 Ala., 413; *Nat. Commer. Bank v. Mobile*, 62 Ala., 284, 34 Am. Rep., 15; *Underhill v. Calhoun*, 63 Ala., 216; *State v. Yellow Jacket Silver Mining Co.*, 14 Nev., 221; *O'Grady v. Barnhisel*, 23 Cal., 294; *State v. Sergeant*, 76 Mo., 557; *Hayden v. Foster*, 13 Pick., 494; *Thompson v. Carroll's Lessee*, 22 How., 422, 16 L. Ed., 387.

As stated by Mr. Cooley, volume 2, page 828:

"Very summary remedies have been allowed in every age and country for the collection by the government of its revenues. That is considered a matter of State necessity. . . . If the State might be deprived of the resources for continuing its existence and performing its regular functions until revenue could be collected by the process provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties. Obviously, this could not be tolerated. It has been shown in the preceding chapters that the protective principles of the common law are not supposed to be violated by a resort to summary proceedings in these cases. Sum-

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mary processes are not necessarily unjust, though they would be so if they deprived the party of a hearing, or if they precluded the opportunity for a patient and deliberate examination of the questions upon which his rights depend, before such rights could be finally concluded and cut off. But it is not the design of legitimate tax legislation to do this in any case. It may depart widely in its methods from those resorted to for the enforcement of rights at the common law, but the fundamental rules of justice will be observed, and, in theory at least, revenue laws will be careful for the protection of individual rights."

And at page 829, the same author says:

"A sovereignty will provide such methods for the collection of its revenue as are suitable to the various taxes laid, and its discretion is only limited by constitutional principles."

In a note to the text the author says that in the absence of constitutional restrictions the sovereign power of the State may be exercised almost without limitation in determining how taxes shall be levied and collected. *In re Page*, 60 Kan., 842, 58 Pac., 478, 47 L. R. A., 68.

"No prerogative of sovereignty is of higher importance than the power of taxation, which includes the collection as well as the assessing of taxes." *Stevens v. New York & O. M. R. Co.*, 13 Blatchf., 104, Fed. Cas. No. 13,405.

"Where the power exists to impose a tax, the means to be adopted for its collection must, within reasonable

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and rationable limits, be a question for the legislature alone." *Nichol v. Ames*, 173 U. S., 509, 19 Sup. Ct., 522, 43 L. Ed., 786.

"The levying and collecting of a tax, whether State or county, is a matter solely of statutory creation." *Hinchman v. Morris*, 29 W. Va., 673, 2 S. E., 863; *Short v. State*, 80 Md., 392, 31 Atl., 322, 29 L. R. A., 404, citing *Appleton v. Hopkins*, 5 Gray, 530.

In *Cummings et al. v. Cummings et al.* (C. C.), 91 Fed., 602, it was held:

"That under the laws of North Carolina the claim and lien of the State for taxes on real estate is *in rem*, and, although land is in the possession of a life tenant upon whom rests the legal duty of paying the taxes thereon, a sale for their nonpayment conveys the entire title, and not merely the life estate."

It was said in the midst of the opinion that the State of North Carolina has the ultimate ownership of all the land within its boundaries. These lands are held under the State, subject to the payment of the taxes assessed thereon. The lien of the State therefore is *in rem*. The State looks to the *res* for the tax. If the tax be not paid, the State can sell the land. Citing *Moore v. Byrd* (N. C.), 23 S. E., 968.

It is further stated that one reason why the life tenant is bound to keep down the tax is that he is bound to preserve the interest of the remaindermen. If the tax be not paid, the inheritance may be forfeited. So the question need not be discussed whether the life es-

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tate only has been forfeited, or the reversion left in Cummings after his deed of trust. If anything be forfeited, it is the whole estate, because the tax is assessed on the *res*.

In *Osterberg v. Union Trust Co.*, 93 U. S., 424, 23 L. Ed., 964, the supreme court of the United States, in dealing with the question whether a mortgagee must see that the taxes are paid, although assessed upon the property subsequent to his mortgage, said:

"A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment and decree, unless otherwise directed by the statute. It deals with the *res* without regard to individual ownership, and when it is enforced by sale pursuant to the statute prescribing the mode of assessing and collecting, then the purchaser takes a valid and unimpeachable title."

In *Atkins v. Hinman*, 7 Ill., 437-439, the supreme court of the State said as follows:

"The tax is a lien against the land, not against a particular individual. The land itself is sold, and not a particular interest in it. If the land is subject to taxation, and the proceedings under the revenue laws have been regular, and the owner has failed to redeem within the time limited by the law, then the whole legal and equitable estate is vested in the purchaser. A new and perfect title is established. This results from the paramount authority of the State to levy taxes on property

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within its limits and coerce the payment by subjecting the property to sale.”

We think these authorities dispose of the assignments of error on behalf of the appellants to the effect that said assessment laws are not the law of the land, are inimical to the provisions of section 8 of the constitution of Tennessee and the fourteenth amendment to the constitution of the United States, in that they deprive remaindermen of their property without due process of law.

There is another branch of the case yet to be considered. The attorney general of the State has filed the record for writ of error to that portion of the decree disallowing the penalties, amounting to \$208.47, reported by the clerk and master. Said penalties are claimed by the State under section 49, chapter 258, page 681, Acts 1903, as follows:

“That every taxpayer shall pay his State, county, railroad, municipal, highway, school, and all his property and poll taxes to said trustee, except when otherwise provided by law, and said taxes shall be due and payable on the first Monday in October of each year, and shall bear interest from the first day of March following, and in addition a penalty of one per cent for each month the taxes are delinquent to be added on the first day of each month, beginning with the first of March, except as otherwise provided in regard to municipal and poll taxes.”

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It appears that the assessment acts of 1897, 1899, and 1901 contain a similar provision.

The insistence of the State is that, if said taxes are a lien on the land, and not merely on the life interest, the penalties are also collectible out of the land or its proceeds in the hands of the clerk.

We do not concur in this contention. The remaindermen are in no default in the payment of these taxes. It was primarily the duty of the life tenant to pay them, and the penalties for nonpayment were chargeable to him. The taxes are made a lien on the entire fee in the land, and collectible by a proceeding *in rem*; but there is no authority in the act for operating the remaindermen with penalties for the default of the life tenant. Under a proper construction of the act the penalties are only chargeable against the person whose duty it was in the first instance to make payment of the taxes.

The decree of the chancellor is in all respects affirmed.

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POLLY WORTHINGTON, *Adm.*, *et al.* v. NASHVILLE,
CHATTANOOGA & ST. LOUIS RAILWAY.

(*Nashville.* December Term, 1904.)

JURY TRIAL IN CHANCERY. On second trial, though expressly waived on first trial.

The waiver of a jury demanded in the bill made by agreement at or before the first trial that the chancellor might try the case as a jury does not deprive the defendant of the right to demand a jury on a second or new trial, especially where it is not shown that there was any rule regulating the matter.

Code cited and construed: Secs. 4611-4616, 6282-6286 (S.); secs. 3602-3605, 5215-5219 (M. & V.); secs. 4465-4469 (T. & S. and 1858).

Cases cited and approved: *Allen v. Saulpaw*, 6 Lea, 481; *Cooper v. Stockard*, 16 Lea, 140; *Cheatham v. Pearce*, 89 Tenn., 688; *Stedham v. Stedham*, 32 Ala., 525; *Martin v. King*, 72 Ala., 359; *Cross v. State*, 78 Ala., 432; *Benbow v. Robbins*, 72 N. C., 422; *Burnham v. Railroad*, 88 Fed., 627; *Brown v. State*, 89 Ga., 340; *Carthage v. Buckner*, 8 Ill. App., 152.

Case cited and disapproved: *Lananhan v. Heaver* (Md.), 26 Atl., 866, 20 L. R. A., 759.

FROM WARREN.

Appeal from the Chancery Court of Warren County.
—THOS. M. MCCONNELL, Chancellor.

Worthington v. Railroad.

SMITH & SMITH, for complainants.

WHITSON & MERCER and CLAUDE WALLER, for defendant.

MR. JUSTICE WILKES delivered the opinion of the Court.

The bill in this case was, in substance, to enjoin the railroad company from setting up an accord and satisfaction claimed to have been entered into by complainants, as the widow and next of kin of Wade Ledbetter, settling their claim against the railroad for the negligent killing of said Ledbetter.

The bill demanded a jury for the trial of all issues of fact.

When the case came on for trial the complainants waived their right to a jury, and agreed with defendant that the chancellor might try the case as a jury, his findings to have the same weight and effect as a finding of facts by a jury. The defendants agreed to this, and an order was entered of record to that effect.

The chancellor, thus sitting as a jury, made the following findings of fact and rendered the following judgment, to-wit:

"The court, sitting as a jury, is of opinion and finds that the release and compromise entered into between complainants and defendant, as set out in complainants' bill, and which was reduced to writing finally of date

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August —, 1899, considering the time when it was first made—the next day after the death of complainant Polly's son (when she was naturally in deep distress)—the ignorance and poverty of all the complainants, the small amount paid by respondent, and the want on the part of complainants of full and fair information as to the facts of the alleged killing, was unfair, unjust, and amounted to a fraud on complainants, and therefore is null and void, and is not binding on complainants, and is so decreed."

The court further decreed said compromise and release be annulled and set aside, perpetually enjoined defendant from relying on same as a defense to a recovery of damages in case of Polly Ledbetter, administratrix, against defendant, in the circuit court of Warren county, and from pleading said accord and satisfaction as a defense in said suit.

From this decree defendant appealed to the supreme court, where the case was heard on the 7th day of March, 1904, and the court held that the judgment of the chancery court was manifestly erroneous, "in that the chancellor, sitting as a jury, failed to find all the material issues raised in the pleadings."

The cause was remanded for a new trial.

Upon this remand and on the new trial defendant demanded a jury to try the issues of fact, which was refused by the judge, because, in his opinion, defendant had waived the right to make such demand on the first trial, and had elected to try before the judge as a jury,

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and this election remained in force upon the second trial, and could not be withdrawn.

The defendant excepted to this order of the court, and the chancellor proceeded to try the case the second time as a jury under the original agreement.

Upon this trial the chancellor found all the issues of fact in favor of the complainants, set aside the compromise and release, and enjoined defendant from relying on same in any legal action for the recovery of damages.

Defendant prayed, and was granted, an appeal, and assigns as error this action of the court in refusing to allow a jury upon the second trial.

The assignment is as follows:

"The chancellor erred in disallowing defendant's demand for a jury to try the issues of fact in this cause, and in adjudging that the defendant was precluded from demanding a jury because of the agreement made at the September term, 1902, previous to first trial of the cause, by which it was agreed that the chancellor might try the case as a jury upon the questions of fact, instead of questions of fact being tried by jury demanded by complainants."

The provisions of our statutes in regard to jury trial in chancery causes are as follows:

"Either party to a suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, and all the issues of fact in any case

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shall be submitted to one jury." Code 1858, sec. 4465; Shannon's Code, sec. 6282.

"If the demand is made in the pleadings the cause shall be tried at the first term before a jury summoned instanter, in the same way that jury causes are tried at law." Code 1858, sec. 4466; Shannon's Code, sec. 6283.

"If the demand is only made after the cause is ready for hearing, the trial will be before a jury summoned instanter upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause, as the court may order." Code 1858, sec. 4467; Shannon's Code, sec. 6284.

"The issues shall be made up by the parties under the direction of the court, and set forth briefly and clearly the true questions of fact to be tried." Code 1858, sec. 4468; Shannon's Code, sec. 6285.

"The trial shall be conducted like other jury trials at law, the findings of the jury having the same force and effect, and the court having the same power and control over the findings, as on such trials at law." Code 1858, sec. 4469; Shannon's Code, sec. 6286.

It is held in *Allen v. Saulpaw*, 6 Lea, 481, that either party to a suit in chancery is, upon application, entitled to a jury to try and determine any material fact in dispute, and that the demand for a jury may be made at any time before the case is in fact heard by the chancellor.

This case is approved and followed in *Cheatham v. Pearce*, 89 Tenn., 688, 15 S. W., 1080, and it is said that

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in the absence of any rule of court regulating the matter a jury may be demanded at any time before the cause is heard by the chancellor.

It is not shown that the chancery court of Warren county has any rule regulating the matter.

The exact question presented, however, is whether the waiver of a jury and agreement that the chancellor may try as a jury, made before the first trial, may be enforced, over the objection of either party, in any subsequent trial.

It is proper to remark that the statutes regulating the time and manner of demanding jury trials in law cases, embraced in sections 4611 to 4616, Shannon's Compilation, do not apply to the chancery court. *Cheatham v. Pearce & Ryan*, 89 Tenn., 688, 15 S. W., 1080; *Cooper & Stockell v. Stockard*, 16 Lea, 140.

The rule is stated in Thompson on Trials, vol. 1, sec. 2, as follows:

"The prevailing opinion seems to be that the waiver of a jury at one term will not estop the party from claiming it at a subsequent term, or after a new trial has been granted."

In the case of *Martin v. King*, 72 Ala., 359, the court says:

"The question is whether the defendants on the second trial are bound by an agreement to waive a jury entered into upon the first trial. It is our judgment that they are not concluded by such waiver. The agreement, being one in abrogation of a valuable constitution-

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al privilege, must, for that reason, be strictly construed. It would require most liberal and enlarged construction to extend its operation beyond the particular trial apparently contemplated by it. It may be that the litigants would be willing for the particular judge who presided at one trial to act as both judge and jury, and be entirely unwilling to risk his successor who might sit in judgment upon their rights at a subsequent term."

To the same effect is the case of *Stedham's Heirs v. Stedham's Ex'r*, 32 Ala., 525, and the case of *Cross v. State*, 78 Ala., 432, which latter case refers to said case of *Martin v. King*.

The case of *Benbow v. Robbins et al.*, 72 N. C., 422, was a civil action to recover damages for ponding water on plaintiff's land. On the first trial a jury had been dispensed with, it being agreed that the judge should find the facts and declare the law. The judge found the facts for plaintiff, but the case was reversed upon the question of the statute of limitations. The case again being heard in the lower court, instead of trying it anew, his honor held that the parties were bound by the finding of facts at the former trial, which were in favor of plaintiff, and gave judgment for the plaintiff, directing the defendant to take down his dam. In reversing the case the court said:

"Whether the facts are found by the jury or by the court, if it appears that the finding was influenced by misconstruction or misconception of the law, a new trial will be granted by this court on appeal. And in such

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cases the former trial goes for nothing. And where the first trial had by consent of parties, been by the court, a second trial must be by a jury, unless there be a new agreement that the court may try."

The case of *Burnham et al. v. North Chicago St. R. R. Co.*, reported in 88 Fed., 627, 32 C. C. A., 64, was a suit brought to recover the price of a street car traction motor constructed by the plaintiffs for the defendant. Upon the first trial a jury was waived, and case submitted to the court for trial without jury, and the stipulation to waive jury was followed by an order of the court to that effect. A judgment was rendered by the court upon the trial of the case, and the case taken by writ of error to the United States circuit court of appeals, where the judgment was reversed, and a new trial ordered; the case being reported in 88 Fed., 627, 23 C. C. A., 677. On the second trial the plaintiffs asked for a jury trial, which request was denied, to which ruling exception was taken. On appeal the court of appeals held:

"The stipulation to waive a jury, and to try the case before the court, only had relation to the first trial. There could be no presumption then that there would ever be a second trial; and therefore it should not be presumed that the parties, in making the stipulation, had in mind any possible subsequent trial after the first, to which the stipulation could refer."

And again:

"A stipulation to waive followed by an order of the

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court is not in the nature of a private contract founded upon a consideration which can only be set aside for fraud."

See, also, *Cross v. The State*, 78 Ala., 430; *Brown v. The State*, 89 Ga., 340, 15 S. E., 462; 12th Ency. Plead. & Prac., 270.

In the case of *Carthage v. Buckner*, 8 Ill. App., 152, it is said:

"It appears that on the first trial the parties entered into a written stipulation of facts agreed upon as proven on the trial, and also that a jury should be waived and the case submitted to the court for trial. On the second trial appellant claimed that under such stipulation a jury should again be waived and the case be tried by the court, and entered a motion to that effect. The action of the court in overruling this motion is one of the errors assigned. In this, we think, no error was committed. The agreement to waive a jury only bound the parties to the mode adopted—of trial by the court—to that one trial. When the case was remanded by this court for another trial in the court below, both parties were restored to their original right of trial by jury. Each party is entitled to as many juries as there are trials, and a waiver of a jury on one trial is expended by that trial."

There are respectable authorities holding a contrary doctrine, notably the case of *Lananhan v. Heaver* (Md.), 26 Atl., 866, 20 L. R. A., 759, though this case is not

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directly in point. See, also, 12 Ency. Pleading and Practice, 270.

We are of opinion that upon the retrial either party had a right to a jury, and such right could not be denied.

There is therefore no error in the decree of the court of chancery appeals, and it is affirmed.

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W. B. GREENLAW, *Admr.*, v. LOUISVILLE & NASHVILLE
RAILROAD COMPANY.

(*Nashville.* December Term, 1904.)

1. **VERDICT.** Not to be directed upon undisputed facts testified to by one witness, where other facts are testified to by other witnesses, when.

Where, in an action for wrongful death, the undisputed facts testified to by one of the plaintiff's witnesses showed that the deceased was guilty of contributory negligence which was the direct and proximate cause of the accident causing the death, it was improper for the judge to direct a verdict for the defendant upon consideration of the evidence of the one witness only, but such direction if proper, should be based upon a consideration of the entire evidence, and not upon detached portions thereof, and if not so based, and other facts were testified to by other witnesses, he should instruct the jury to find for the defendant, if they believe the testimony in the case shows such contributory negligence.

2. **SAME.** Same. No reversal for direction of verdict, where merits have been reached, when.

But where, upon a consideration of the entire evidence, the supreme court is of the opinion that the trial judge was right in his conclusions in directing a verdict for defendant, and that the merits of the case have been reached, there is no reversible error in the action of the court in so directing a verdict, and the judgment will be affirmed.

Cases cited and approved: *Graham v. Bradley*, 5 Hum., 476; *Farquhar v. Toney*, 5 Hum., 502; *Robinson v. Railroad*, 2 Lea, 594; *Gregory v. Underhill*, 6 Lea, 211; *Jones v. Iron Co.*, 14 Lea, 157.

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FROM MAURY.

Appeal from the Circuit Court of Maury County.—
SAM HOLDING, Judge.

GREENLAW & WHITTHORNE and SALMON & TURNER,
for Greenlaw.

GEO. T. HUGHES and JOHN BELL KEEBLE, for Rail-
road.

MR. JUSTICE WILKES delivered the opinion of the
Court.

This is an action by the administrator of Prince Frierson against the railroad company for injuries resulting in the death of Frierson. The case was heard before the court and a jury, and, after the close of the testimony, the court charged the jury as follows:

“When the facts are admitted and undisputed, the question of negligence is a question which the court may determine, and the court may do so without submitting to the jury; or if the admitted and undisputed facts show both parties guilty of negligence, then the court may also determine the question whose negligence, if anybody’s, was the direct and proximate cause of the accident and injury. It is the law in cases of

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this kind, under the statute made for the prevention of accidents upon a railroad, that the plaintiff show not only that the defendant was negligent, but also that the defendant's negligence was the direct and proximate cause of his injury; for if the plaintiff's own negligence—that is, in this case, if the deceased's negligence—was the direct and proximate cause of the accident, or if his negligence proximately contributed to the accident, the plaintiff cannot recover.

"The undisputed facts in this case are that the deceased, Prince Frierson, was out between the main track and the passing track, with the baggage trucks, awaiting the arrival of the Mt. Pleasant accommodation, which was then backing in on the main track, going south, for the purpose of transferring the baggage on the trucks to the baggage car, as it was the duty of the deceased to do.

"And at the same time there was a switch train going north, being run on the passing track. It is also undisputed that the deceased's attention had been called to the switching train, and that he saw the approaching switch train before he took his position at the south end of the baggage trucks, and that, after taking his position at the south end of the baggage trucks, he left that position and came around to the side of the trucks, and, in so doing, he stepped within striking distance of this moving switch train just in time to be struck by it, and he was knocked down, run over, and killed.

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"These are the immediate facts of the accident, as testified to by plaintiff's own witness, the only one of his witnesses who saw the accident; and these facts are not disputed.

"Therefore, upon these undisputed facts in this case, I charge you that the deceased, Prince Frierson, was guilty of negligence in stepping within striking distance of the moving train under the above circumstances, and that such negligence was the direct and proximate cause of the accident, and that the plaintiff cannot recover.

"You will therefore return a verdict for the defendant, which you may do in the box, or retire—either."

It is said, by way of assignment of error, that the practice of directing verdict by trial judge is one not sanctioned by our practice, but, on the contrary, it is condemned by a number of cases.

On the other hand, it is contended that it is, or should be, proper practice in a proper case.

Without passing directly upon this question, we are of opinion that, under the facts disclosed in this record, a proper case is not presented for the direction of the jury by the trial judge in arriving at their verdict.

It will be noticed from the charge of the trial judge, which we have quoted above, that he makes a statement of the case, and says: "These are the immediate facts of the accident as testified to by the plaintiff's own witness, the only one of his witnesses who saw the accident; and these facts are not disputed. Therefore,

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upon these undisputed facts in this case, I charge you," etc., to the effect that the deceased was guilty of negligence, which was the direct and proximate cause of the accident; therefore that the plaintiff, as his administrator, could not recover.

We think it was error in the court to base his findings and charge upon the testimony of any one witness, ignoring all the other testimony in the case, although that witness may have been in a better position than any other to see and know the facts attending the accident.

Now, while the facts stated by the trial judge are proven and not disputed, and would, if alone considered, be sufficient to prevent a recovery, perhaps, still there are other facts testified to by other witnesses which should not be ignored by the judge, but he should have told the jury that if they believed the testimony given in the case, then there was no ground of recovery, and they should give their verdict accordingly. But the entire case should be submitted, and considered by the judge, and the jury should still have left to them the credibility of the witnesses and the reliability of the testimony.

This court has had a number of cases before it in which the trial judge has, after a consideration of the entire record, directed the jury what verdict to return; and, although the court has not in express terms approved the practice, it has said in a number of cases that, if the trial judge has arrived at a correct conclu-

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sion, the verdict of the jury and judgment of the court, based upon his instructions, will not be disturbed. *Graham v. Bradley*, 5 Humph., 476; *Farquhar v. Toney*, 5 Humph., 502; *Robinson v. Railroad*, 2 Lea, 594; *Gregory v. Underhill*, 6 Lea, 211; *Jones v. Cherokee Co.*, 14 Lea, 157.

There are a number of cases in our books which seem to hold that the practice of directing a verdict does not prevail in Tennessee.

Undoubtedly, in other jurisdictions the weight of authority is that such a practice is proper and conducive to the prompt and proper determination of legal controversies.

Practically the same result is reached by a demurrer to the evidence, and it is difficult to see why the practice of directing a verdict is not warranted by reason as much so as is the practice of demurring to the evidence. Indeed, in its practical application, it is more simple, direct, and easily understood, and better calculated to do justice and arrive at a correct result, than is the practice of demurring to the evidence. The practice of demurring to the evidence was in disuse in this State for a long number of years, until quite recently, and now prevails quite generally, and, we think, with beneficial results.

In the practical operation of the two modes of procedure, as we have before stated, directing the verdict appears to be the more direct and easily administered, and is not fraught with such summary results to the

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party demurring as is the case when the demurrer is not sustained.

We think, however, that, wherever the jury is directed to return a verdict, it should be upon a consideration of the entire evidence in the case, and not upon any detached portion of such evidence.

In the present case, we quite agree with the learned trial judge that the deceased was guilty of negligence, which was the direct and proximate cause of the accident, and the plaintiff cannot recover as his administrator.

We are of opinion, therefore, that the merits of the case have been reached, and that there is no reversible error in the action of the court below, and the judgment of the court below is affirmed, with costs.

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STATE, *ex rel.*, v. CUMBERLAND TELEPHONE & TELE-
GRAPH COMPANY *et al.*

(Nashville. December Term, 1904.)

1. **TELEPHONE COMPANIES.** Like telegraph companies are common carriers of news.

Telephone companies like telegraph companies are common carriers of news, and as such are touched with a public use. (*Post*, p. 200.)

2. **CORPORATIONS.** Foreign admitted by comity, subject to our laws and jurisdiction of our courts.

Admission of a foreign corporation to do business in this State is a matter of comity, and not of right, so that, when such corporation enters the State and undertakes to do business here, it becomes amenable to our laws and subject to the jurisdiction of our courts, exactly as a private individual or domestic corporation. (*Post*, p. 200.)

Case cited and approved: *Bank v. Earle*, 13 Pet., 519.

3. **SAME.** Forfeiture of charter or ouster must be adjudged in pursuance of statute, notwithstanding mistake and good behavior.

Where a corporation is found guilty of an act of omission or commission which is expressly declared by statute to be a cause of forfeiture of its franchise, clearly the court has no jurisdiction to refuse a judgment of forfeiture, but is bound to award a judgment of ouster on demand of the State, although the corporation's default was the result of mistake, and notwithstanding its subsequent good behavior. (*Post*, pp. 201, 202.)

Cases cited and approved: *State v. Canal Co.*, 23 Ohio St., 121; *State v. Association*, 35 Ohio St., 258; *People v. Railroad*, 53 Barb., 98.

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4. **SAME.** Forfeiture for failure to comply with statutes not declaring forfeiture is not to be adjudged, unless public interest requires it.

Where the failure of a corporation to do an act required by statute is not declared by the statute to be a cause of forfeiture of the corporation's franchise, and the violation of the statute by such failure has not been flagrant and persistent, and there is no menace to the public welfare, the court should refuse a judgment of forfeiture, unless the public interest requires it. (*Post*, pp. 202-210, 212.)

Cases cited and approved: *State v. Insurance & Trust Co.*, 8 Hum., 235; *State v. Turnpike Co.*, 2 Sneed, 254; *Harris v. Railroad*, 51 Miss., 602; *Royalton v. West Fairlee*, 11 Vt., 438; *State v. Association*, 35 Ohio St., 258; *State v. Association*, 42 Ohio St., 579; *State v. Railroad*, 36 Minn., 246; *State v. Turnpike Co.*, 102 Ind., 283; *State v. Bank*, 8 Vt., 489; *State v. Packing Co.*, 173 Mo., 356; *Weston v. Lane*, 40 Kan., 479; *State v. Railroad*, 91 Iowa, 517; *State v. Water Power (Wis.)*, 66 N. W., 512, 32 L. R. A., 391; *People v. Turnpike Co.*, 23 Wend., 222; *Attorney-General v. Railroad*, 55 Mich., 15; *State v. Railroad*, 41 Tex., 217; *Central, etc., Co. v. People*, 5 Colo., 39.

Cases cited, distinguished, or disapproved: *State v. Turnpike Co.*, 1 Shannon's Tenn. Cas., 511; *State v. Turnpike Co.*, 8 R. L., 521.

5. **SAME.** Foreign not complying with statute as condition of doing business are not entitled to affirmative relief, though failure was through mistake or inadvertence.

The failure of a foreign corporation to file an abstract of its charter and have it registered, as required by statute, in each county in which it does business, when that law was in force, would have been fatal to any application for affirmative relief made to one of the courts of the State for the breach of a contract which had been entered into with it as to business in one of these counties, although such failure so to comply with the statute was not the result of willfulness and intentional dis-

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regard of the law, but rather of a pure inadvertence or mistake.
(*Post*, pp. 200, 201.)

Acts cited and construed: 1877, ch. 31; 1891, ch. 122.

Cases cited and approved: *Lumber Co. v. Thomas*, 92 Tenn., 593; *Harris v. Water & Light Co.*, 108 Tenn., 245.

6. **SAME.** Ouster not adjudged against foreign for omission to comply with statute as to local business, where statute imposed no such penalty, when.

Where a foreign telephone corporation complied with our law for its admission into this State, but through inadvertence or mistake it failed to file and have registered an abstract of its charter, in each of the counties in which it opened up exchanges for business as required by a then existing statute, which omission was remedied by the corporation upon its discovery thereof, a judgment of ouster should not be rendered, if the statute imposed no such penalty for noncompliance therewith. (*Post*, pp. 200-202.)

Acts cited and construed: 1877, ch. 31; 1891, ch. 122.

7. **SAME.** Telephone company's purchase of competing companies is not ground for forfeiture or ouster.

A telephone company's purchase of small competing local telephone companies, to end a ruinous war of rates and to avoid further competition in these particular localities, where the small companies were in operation, was not illegal, nor ground for forfeiture of the purchasing company's charter or its ouster from the State. (*Post*, pp. 210, 211.)

Acts cited and construed: 1887, ch. 198.

8. **SAME.** *Ultra vires* lease is not ground for forfeiture or ouster years after its avoidance and resumption of corporate duties, when.

An *ultra vires* lease of its plant in a certain city made by a telephone corporation is not ground for a forfeiture of its franchise years after its avoidance of the lease as *ultra vires*, and its resumption of its corporate duties in that city. (*Post*, pp. 211, 212.)

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FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

E. H. HATCHER and PADGETT & FIGURES, for Relators.

VERTREES & VERTREES and W. L. GRANBERY, for Telephone Company.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The bill in this cause was filed upon the relation of certain citizens of Columbia, in Maury county, in this State, asking a decree ousting the Cumberland Telephone & Telegraph Company from the further exercise of its corporate franchises in Tennessee, save as they might concern interstate commerce. Many allegations of abuse upon the part of this company of its corporate duties and rights as furnishing grounds for such decree are made in the bill, only two of which were sustained by the chancellor. Upon an appeal to this court the cause was referred to the court of chancery appeals, when that court reversed the decree of the chancellor and dismissed the bill. The cause is now before us for review.

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The Cumberland Telephone & Telegraph Company is a corporation organized under the laws of Kentucky, and is engaged in a general telephone business in Tennessee, Kentucky, Alabama, Mississippi, and other States. As early as 1883 or 1884 it entered this State, and established exchanges in many of its cities and towns. From these places lines were extended until, at the time of the filing of the present bill, practically all parts of the State were placed in easy telephonic connection, and by business arrangements which were made with other telephone systems the people of Tennessee were placed in touch with exchanges throughout the United States, and possibly Europe. Among the exchanges so established was one in the city of Columbia.

Through this exchange its citizens had all the advantages accruing to patrons of the company from its extensive interstate as well as foreign connections. In the development of the system, rates were fixed which in the process of time became so unsatisfactory to some of the people of that city and county that after a fruitless effort to secure a reduction, a competitive company, called the "City Telephone Company," was organized, the avowed purpose of which was to give cheaper telephone service to its patrons. A large number of these relators were instrumental in this movement, and at the time of the filing of this bill were pecuniarily interested in its success. Upon the organization of this company a central exchange was opened in Columbia, and from it lines were extended connecting with exchanges estab-

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lished at different points in Maury county. The service which was rendered was charged for at figures much below the rates exacted by the defendant company. The rates thus fixed were found after a time much too low to enable the company to furnish efficient service, so that, to keep it in operation, donations, amounting to four or five thousand dollars, were made to it by citizens of that community.

The reductions referred to above, made by the new company, were promptly met by its competitor, and a war of rates began. The Cumberland Telegraph & Telephone Company agreed, among other things, to furnish telephone service at residences for 50 cents a month, and in some cases one of its canvassers proposed to place instruments in the homes of its subscribers without cost to them.

These details, while not essential to a right determination of the case, yet serve in part to illustrate the animus of these companies to each other, and furnish, in part, a motive for the institution of this proceeding. They clearly indicate that the contest involved a struggle for continued supremacy on the part of the older company, and for existence upon the part of the younger. Such a contest, in the nature of things, must have engendered much of personal bitterness; that it did do so is shown in this record.

Other facts found by the court of chancery appeals which raise the questions of law made on the decree of

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that court will be referred to as these questions are presented in their proper order.

Before, however, coming to the consideration of these questions, it is well to state two propositions well established by the authorities, which bear in a general way upon this controversy.

The first of these is that a telephone like a telegraph company is a common carrier of news, and as such is touched with a public use. The second is that the admission of a foreign corporation to do business in this State is a matter of comity, and not of right, so that, when such corporation enters the State and undertakes business herein, it becomes amenable to our laws, and subject to the jurisdiction of our courts, exactly as is a private individual or a domestic corporation. 6 Thomp. on Corporation, section 7886; *Bank of Augusta v. Earle* 13 Pet., 519, 10 L. Ed., 274.

Coming now to the grounds of forfeiture insisted upon by the relators, we find the first of these to be that of a failure upon the part of the defendant company to register abstracts of its charter in the various counties of this State where it was doing business, as required by chapter 31, p. 44, of the Acts of 1877, amended by chapter 122, p. 264, of the Acts of 1891.

As to this, it is found by the court of chancery appeals that the defendant company in April, 1891, filed, as required by these two acts, a duly certified copy of its charter in the office of the Secretary of State of Tennessee, and an additional copy in April, 1894, but that it

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failed to file an abstract of the charter, in each of the counties of the State where it opened up exchanges for business, with the register of these respective counties. The court reports that the corporation intended to file these abstracts, but by an inadvertence they were sent to the clerks of the county courts of these several counties, and as a result, were not registered at the time they were so sent. However, after the institution of this suit in 1896, and before the answer of the corporation was filed, upon discovering this mistake, these abstracts were registered in the several counties though, under an act amendatory of the acts of 1877 and 1891, this was no longer necessary.

In other words, the failure upon the part of the corporation to meet the statutory requirement in this respect, was not the result of willfulness and intentional disregard of the law, but rather of a pure inadvertence or mistake. That this inadvertence or mistake would have been fatal to any application for affirmative relief made to one of the courts of the State for a breach of a contract which had been entered into with it as to business done in one of these counties, is unquestionably true. *Cary-Lombard Co. v. Thomas*, 92 Tenn., 593, 22 S. W., 743; *Harris v. Columbia W. & L. Co.*, 108 Tenn., 245, 67 S. W., 811. But will an omission such as this move the court to the extreme step of decreeing a forfeiture of its right to transact all intrastate business?

If a corporation is found guilty of an act of omission or commission which is expressly declared to be a cause

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of forfeiture of its franchise, clearly a court has no discretion to refuse such a judgment. *State v. Oberlin, etc., Ass'n*, 35 Ohio St., 258; *State v. Penn., etc., Canal Co.*, 23 Ohio St., 121; *People v. Northern R. R.*, 53 Barb., 98. In such a case, as a mere matter of law, a court is bound to award a judgment of ouster. Neither mistake on the part of the corporation nor subsequent good behavior will disable the State from demanding such judgment. 5 Thompson on Corporations, section 6644.

But it is to be observed that there is no statute which declares in terms that a violaton of the duty imposed in the regard now being considered involves, necessarily, a forfeiture of the right to do business in this State. If there was such statute, then, whether reasonable or unreasonable in its nature, it would be the imperative duty of the courts to enforce it. But as the law is silent, and the court is called upon to deal so rigorously with this corporation, it must be controlled by general principles as laid down in well-considered cases, and by the best text-writers dealing wth the subject.

First of all, we think a controlling consideration, when such action is invoked, must be the public interest; will it be subserved or not by the application of so strenuous a remedy? If it will not, then, in the absence of flagrant and persistent violation of a statutory duty, and especially where in the violation there is no menace to the public welfare, it would seem, as a matter of natural reason and justice, that the extreme penalty of

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forfeiture should not be exacted. It is not every excess of power nor every omission of duty which will constitute cause of forfeiture of the charter of a corporation. *Harris v. Miss. Valley, etc., R. R.*, 51 Miss., 602; *Town of Royalton v. Town of West Fairlee*, 11 Vt., 438. Courts act with extreme caution in proceedings which have for their subject the forfeiture of corporation franchises, and we think that the great weight of authority is that a court may exercise its discretion, and should refuse a judgment of forfeiture if upon the whole case it finds that the interest of the public does not require it.

As is said in the valuable work of Mr. Spelling on Inj. and other Ex. Rem., vol. 2, section 1777: "That the court may exercise a considerable latitude of discretion, both as to whether it will grant a rule upon the defendant to show cause, where the proceeding is instituted in that way, and as to whether there has been sufficient abuse of franchise by a corporation to warrant their forfeiture, there can be no doubt upon the authorities. But so many relations, public and private, are involved in a forfeiture at suit of the State, and each case involves so many considerations peculiar to itself, that no definite general rules can be stated to guide courts and practitioners. It must be borne in mind that specific facts which have been held sufficient to warrant a judgment of forfeiture in one or several adjudged cases may be so modified by extraneous facts in another case as to deprive the former of value as guide to a correct decision. The most important, if not the only, interest to be ob-

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served, is that of the public. Especially do these observations apply in cases where the proceedings are based upon misuser or nonuser of franchises. It may be considered well settled that not every misuser which may be detected will justify a forfeiture, but only those constituting a prejudice to some public interest, or which, being persisted in, will involve the safety, welfare, or security of the community."

It is true the author is here speaking of the exercise of discretion by a court upon a preliminary application for leave to file an information, but "the principle that the court has a discretion in the first instance in allowing the information to be filed carries with it, by parity of reasoning, the conclusion that it has a similar discretion after hearing the evidence finally submitted under the issues made up, in granting or refusing the judgment prayed for on behalf of the State or the people." 5 Thomp. on Corporations, section 6811.

Further pursuing this subject, Mr. Spelling in the same volume, at section 1829, says: "The court will refuse a forfeiture, though the corporation is clearly guilty of a misuser, where it appears that no injury has resulted to the public. . . . Courts have a discretion to enter or refuse a judgment of forfeiture accordingly as the public injury appears serious or trivial. The general rule is that to warrant a forfeiture of corporation franchises for misuser, the misuser must be such as to work or threaten a substantial injury to the public."

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In the footnote the author cites many cases which support his text. It is unnecessary to incumber this opinion with a reference to those cases, as the work is readily accessible to the profession.

In section 443 of Wood's Field on Corporations, the author embodies in his text a paragraph to the same effect from High on Extra. Leg. Rem., as follows: "The principle is now firmly established that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which application is made, even though there may be a substantial defect in the title by which the office or franchise is held. In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into consideration the necessity and policy of allowing proceedings, as well as the position and motives of the relator in proposing it. . . . The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application."

Supporting the view of these text-writers, in addition to the cases cited in their notes, we refer to *State v. Oberlin Bldg. & Loan Ass'n*, 35 Ohio St., 258; *State v. People's Mutual Benefit Ass'n*, 42 Ohio St., 579; *State v. Minn. Central Ry.*, 36 Minn., 246, 30 N. W., 816; *State v. Crawfordsville, etc., Turnpike*, 102 Ind., 283, 1 N. E., 395; *State v. Essex Bank*, 8 Vt., 489; *State v. Ar-*

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mour Packing Co., 173 Mo., 356, 73 S. W., 645, 61 L. R. A., 464, 96 Am. St. Rep., 515; *Weston v. Lane*, 40 Kan., 479, 20 Pac., 260, 10 Am. St. Rep., 224; *State v. Omaha R. R. Co.*, 91 Iowa, 517, 60 N. W., 121.

For the contention of the relators to the contrary of this view, we are referred by their counsel particularly to the case of *State v. Pawtuxet Turnpike Co.*, 8 R. I., 521, 94 Am. Dec., 123.

There a turnpike company made a conveyance of a portion of its road to the town, and afterwards ceased to keep that portion in repair. The legislature had previously relieved the corporation from the maintenance of a part of the road originally laid out, and permitted the receipt of the usual tolls for the residue. But the corporation assumed to abandon the repair and maintenance of a further portion of the road, and, the more effectually to relieve itself, made the sale. This was done six years prior to the institution of the proceeding for forfeiture.

The defenses interposed by the corporation were that the lapse of six years was a bar to the filing of the information, and that under one of the sections of its charter it had the right to make the sale which was the basis of the action. Both defenses were found against the corporation, and the forfeiture of its franchise was adjudged.

We think the interpretation of the opinion of this case given by Mr. Waterman in section 427 of his work already referred to is correct. It is in these words: 'It

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was held that as it [the sale] was a willful, deliberate act, putting it out of the power of the corporation to perform its duty in the future, and a continued purpose and plan to escape a plain duty, and to throw off the burden of furnishing the consideration for which the franchise was granted, the charter must be declared forfeited."

Thus interpreted, the case is not out of line with the authorities referred to. For it is everywhere conceded that if a corporation commits an act of misfeasance or nonfeasance going to the very purpose of its existence and seriously affecting the public, and flagrantly persists in the wrongful act, a court will not hesitate to visit it with a judgment of ouster.

Other authorities are referred to by the counsel of appellants in support of the contention that the court has no discretion in a case of this sort, but each one of these furnishes its own limitation, which deprives it of controlling weight in the determination of this question.

We think not only has the court discretion to look to the public weal in refusing or granting a judgment of forfeiture when invoked against a corporation, but it will not be awarded unless the act complained of has been a wrongful or willful abuse of corporate rights or duties. This wise qualification of the law of forfeiture we understand to be well settled by authority. Mr. Waterman, at section 427, vol. 2 of his work already cited, says: "To constitute a forfeiture, there must have been wrongful abuse or improper neglect; some-

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thing more than accidental negligence, excess of power or mere mistake in the mode of exercising an acknowledged power." In Wood's Field on the Law of Corporations, section 414, the text is as follows: "To warrant a judgment of forfeiture against a corporation on the ground of neglect or abuse of corporate powers, such neglect must be more than the result of mere omission to use certain powers possessed, or mere accident, and such abuse must be wrongful and not the result of mistake."

"It is not every failure to perform the duty imposed upon a corporation that will work a forfeiture of its franchise. There must be some plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization, and the acts of misuser or non-user must relate to matters which are of the essence of the contract between the State and the corporation, and they must be wrongful and repeated. There must be something more than accidental negligence, or excess of power, or mere mistake in the mode of exercising it."

With these authors, and Wood on Railroads, vol. 3, section 499, on this point, many cases are in accord. *State of Wisconsin v. Jamesville Water Power* (Wis.), 66 N. W., 512, 32 L. R. A., 391; *People v. Bristol, etc., T. P. Co.*, 23 Wend., 222; *Atty-Gen. v. Erie, etc., R. R. Co.*, 55 Mich., 15, 20 N. W., 696; *State v. Rio Grande R. R. Co.*, 41 Tex., 217; *Central, etc., Co. v. People*, 5 Colo., 39.

This view met with the approval of this court in

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State v. Merchants Ins. & Trust Co., 8 Humph., 235, though in the form of a dictum; and later in *State v. Columbia, etc., Turnpike Co.*, 2 Sneed, 254, where the point, as we understand the opinion was directly involved. However, in *State v. Nonconnah Turnpike Co.*, 1 Shannon's Tenn. Cas., 511, these cases were criticised, and their authority repudiated—the first, on the ground that the question was not involved; and the second, because the statute upon which the proceeding was founded was not indicated in the opinion.

In the *Nonconnah* case it will be seen there had been a flagrant disregard of corporate duties. The company had failed to complete its road within the time given by the original and amendatory acts, and when completed, as claimed by it, the levee across a wide creek bottom, on which the turnpike was laid, was so low that for months it was covered by water, and, when not so, was so muddy and ill constructed that travelers found it impassable, and yet the corporation was asserting the right to collect toll. The violation of the express obligations in these respects imposed upon the corporation by its charter, going, as they did, to the very end and purpose of its existence, and at the same time oppressive to the public, constituted an offense not to be condoned by subsequent good behavior, and justly merited a judgment of forfeiture. On this principle, sustained by the authorities, that case could be rested, and we are satisfied that the argument and conclusion of the court were

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directed to these acts flagrantly violative of corporate duty, though the opinion contains expressions and argument which extend much beyond. Limited to such acts, the case would not be out of line with those earlier cases in our reports which are criticised, nor with the principle which we have heretofore in this opinion announced as being sound in reason and supported by the best authorities. If, however, it is to be understood as being in conflict with this principle, we are not disposed to regard it as controlling in this case.

Now, in view of what has been said, and in the light of the rules extracted from both text-books and reports of courts of the highest standing, we think it clear that the relators are not entitled to invoke the harsh remedy of forfeiture because of the defendant's honest but abortive effort to comply with the law in the registry of an abstract of its charter in the counties of the State in which it did business.

It is next insisted that forfeiture should be adjudged because, after a fierce competitive war with telephone companies in Murfreesboro and Clarksville, which were essentially local, as the result of which these companies were driven to the wall, the Cumberland Telegraph & Telephone Company bought properties and became the sole possessor of the telephone business in these two communities.

We know of no law which will protect the weak against the strong in the war of rates. The inevitable result of such strife, if long continued, must be that the

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former will be compelled to yield to the ampler capital of the latter. This occurred in the two cases referred to. Realizing, as these weaker corporations must have done, that the utter destruction of all their interests would follow continued conflict, they sold out their properties to the defendant company. This sale and purchase were made under the authority of chapter 198, page 329, of the Acts of 1887. That the purchase was made by the stronger company to end a ruinous war of rates and avoid further competition in these particular localities, the transaction being warranted by the act in question, did not make the acquisition of these properties any less legal.

The right to judgment of forfeiture is further rested on the ground that the defendant company leased its plant in the city of Columbia to one Leland Hume for the term of one year, with the privilege of continuance until the lease was terminated by a thirty-days notice given by either of the parties to the contract. Whatever may have been the motives which induced the making of the lease, it has been long since avoided as an *ultra vires* act; why, then, should it now be made a predicate for a decree of forfeiture? Concede that this was an abandonment, unauthorized by law, of its corporate duties in that one locality for the period indicated above; still it has long since resumed control of its property, and is, and has been for years, serving that community. What public interest, then, is to be sub-

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served at this late day in making this act the ground for a decree of ouster from the State?

To the claim that the relators are entitled to such a decree, we think may properly be applied the argument and authorities hereinbefore addressed to the first ground urged for forfeiture. To grant the decree asked for by them would work great confusion, for the time being at least, throughout the State, without corresponding benefit. The telephone, with its local and intrastate connections, has become one of the most important agencies of social and commercial life, the loss of which would be keenly felt, possibly in every neighborhood of the State. Under these conditions we think it the duty of the court, in the exercise of a sound discretion, to decline to apply the remedy asked for by these relators. Upon the whole case we are satisfied with the decree of the court of chancery appeals dismissing the bill, and it is affirmed.

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OF NASHVILLE.

(*Nashville.* December Term, 1904.)

1. **AMENDATORY STATUTE.** Act amending prior act "so as to read as follows," takes effect from date of amendment.

The effect of an amendatory statute which provides that an existing act, or certain specified portions thereof, shall be amended "so as to read as follows," is to substitute the language of the new act, in the sections indicated, for that used in the old act, and such new provisions take effect at and from the time of the amendatory enactment, and not before. (*Post*, p. 218.)

Cases cited and approved: Cent. Pac. R. Co. v. Shackelford, 63 Cal., 265; Ely v. Holton, 15 N. Y., 598.

2. **FOREIGN CORPORATION.** More purchase of property by, without registration of its charter, is not unlawful, but valid as against every one save the State.

The act of 1895, chapter 81, amending the statutes then in force prescribing the terms upon which a foreign corporation may be admitted into this State, provides (sec. 1) that such corporation desiring to own property or carry on business in this State shall first file with the secretary of state a copy of its charter, and, by section 2, makes it unlawful for any such corporation "to do business, or attempt to do business, in this State" without registering its charter in the office of the secretary of state, as provided in the first section. The plaintiff in error, a foreign corporation, purchased the lots, for injury to which its action for damages is predicated, on April 16, 1898, but did not file its charter in the office of the secretary of state until June 11, 1898.

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Held: That the mere acquisition or purchase of property by a foreign corporation, without complying with the requirements of said act, is not unlawful, but is valid as against every one save the State. (*Post*, pp. 218-225.)

Acts cited and construed: 1895, ch. 81; 1877, ch. 31.

Cases cited and approved: *Williams v. Wilson*, Mart. & Y., 248; *Baker v. Shy*, 9 Helsk., 85; *Barrow v. Nashville, etc., Turnpike Co.*, 9 Humph., 304; *Fritts v. Palmer*, 132 U. S., 282; *Seymour v. Slide & Spur Gold Mines*, 153 U. S., 523; *Doe, etc., v. Robertson*, 11 Wheat., 333; *Fairfax v. Hunter*, 7 Cranch, 603; *Cross v. DeValle*, 1 Wall., 5; *People v. Conklin*, 2 Hill (N. Y.), 67; *Wadsworth v. Wadsworth*, 12 N. Y., 376; *Jones v. McMasters*, 20 How., 8; *Davis v. R. R. Co.*, 131 Mass., 273; *Raccoullat v. Sansevain*, 32 Cal., 376; *Gray v. Kauffman*, 82 Tex., 65; *Norris v. Hoyt*, 18 Cal., 217; *Chattanooga, etc., R. Co. v. Evans*, 66 Fed., 809.

Cases cited and distinguished: *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 585; *N. Y., etc., Bldg. & Loan Assn. v. Cannon*, 99 Tenn., 345; *Gilmer v. Savings & Loan Co.*, 103 Tenn., 272; *Harris v. Water & Light Co.*, 108 Tenn., 245.

3. SAME. Same. Purchase of real estate not carrying on business.

There is a plain distinction, under our statutes with regard to the admission of foreign corporations, between the acquisition of property and the carrying on of business, and it would be a strained and unnatural construction to hold that a mere purchase of real estate by such corporation was, in effect, carrying on business in the State. (*Post*, p. 226.)

4. SAME. Same. May maintain action for injury to property.

A foreign corporation may, without registration of its charter, maintain an action for damages against a municipal corporation for injury to its real estate resulting from a change of grade of the street upon which such property abuts. (*Post*, pp. 215, 225.)

See cases cited under headnote 2.

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5. SUPREME COURT. Will not go behind finding of facts by circuit judge.

Where there is a statutory finding of facts by the circuit judge, the supreme court will not go into the record to determine other facts not included in the findings of the circuit court. (*Post*, pp. 215, 216, 225, 226.)

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County.—W. C. CHERRY, Special Judge.

SLEMONS & BARTHELL, for Louisville Property Company.

K. T. McCONNICO and HILL McALISTER, for City of Nashville.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

In changing the grade of Broad street, in the city of Nashville, the municipality inflicted injury on three lots of the Louisville Property Company which abutted thereon, and this action was brought by the company, under the authority of section 1988 of Shannon's Code, to recover damages for this injury. There was a statutory finding by the circuit judge, who tried this case

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without the intervention of a jury. The finding of facts was in accordance with the above statement, but a recovery was denied upon the ground that, at the time the Louisville Property Company took a deed to these lots, it, being a Kentucky corporation, had failed to comply with certain legislative acts regulating the transactions of foreign corporations with regard to business and property in this State.

The facts out of which this phase of the controversy grew, and with regard to which this legal conclusion was reached, are that on the 16th of April, 1898, the lots in question were conveyed by the then owner to the Louisville Property Company. At that date the company had not complied with our foreign corporation acts, but on the 11th of June, 1898, it filed with the secretary of state a copy of its charter, and two days thereafter, to wit, on the 13th of June, 1898, assuming this was necessary, it filed an abstract of its charter in the register's office of Davidson county, where the property is situate.

In view of the conclusions reached by the circuit judge, the soundness of which is seriously challenged by the plaintiff in error, it is necessary to consider the acts which, it is assumed, preclude the plaintiff in error from maintaining the present suit.

On the nineteenth of March, 1877, there was passed the first of the acts regulating the admission of foreign corporations into this State for the purpose of doing business and acquiring and holding real estate. This

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act is chapter 31, page 44, of the Session Acts of 1877, and, by its terms, was limited so as to affect only foreign corporations organized for mining and manufacturing purposes. By the second section of the act it was provided that each of such corporations desiring to carry on business in this State should first file in the office of the secretary of state a copy of its charter, and also cause an abstract of its charter to be recorded in the office of the register of each county in the State in which it proposed to carry on business or to acquire land. By chapter 122, page 264, of the Acts of 1891, this act of 1877 was amended so as to apply to all corporations which might desire to own property or to do business in this State. By the third section of this act it was provided that it should be "unlawful for any foreign corporation to do, or attempt to do any business, or to own or to acquire any property in this State without having first complied with the provisions of this act;" and a violation of the statute, it was provided, should subject the offender to a fine of not less than \$100, nor more than \$500. On the 27th of April, 1895, the legislature passed another act, which is chapter 81, page 123, of the published acts of that year. This act is entitled, "An act to amend sections 2, 3 and 4 of an act passed March 21, 1891, being chapter 122 of said Acts, and providing for the authentication of copies of charters to be filed with the secretary of state, and registering abstracts of same in the register's office in each county in which the company desires or proposes to

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altogether from purchasing or holding real estate within the limits of this State. It does not declare a purchase of land by such corporation, made before it qualified itself to do business in the State, as unlawful, or the conveyance of the land so purchased as absolutely void as to all persons and for every purpose, or that the title to the land remains in the grantor despite his conveyance.

This act of 1895 was the one in force at the time the plaintiff in error took its deed to this property, and its rights are to be determined with regard to the terms of that act and the rules of law arising therefrom.

No controversy is made here, and none at this day could be made, as to the right of the State to prescribe the terms upon which a foreign corporation may carry on business (save that of interstate or foreign commerce) or hold real estate within its limits. But, while this is well settled, the question is, will it be permitted to the municipality of Nashville, which has injured the real estate in question, to defend against an otherwise just claim of compensation for the injury upon the ground that the plaintiff in error had failed to comply with the first section of this statute at the time it took its conveyance? To hold that this can be done, we think, would be counter to many cases furnishing strong analogies to the point involved in this case, and to others of the highest authority ruling upon the exact point here considered. We will now briefly refer to some of these cases:

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An alien, under the common law, was incapacitated to hold real estate. This was a rule of public policy deeply imbedded in that system. No statute of exclusion could have given added emphasis to the rule. Yet, wherever the common-law system prevails, it has been held with entire unanimity, when the question has been presented, that an alien could take by purchase and hold against every one save the State. As was said in *Doe, etc., v. Robertson*, 11 Wheat., 333, 6 L. Ed., 488: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law so well established that the reason of the rule is little more than a subject for the antiquary. It, no doubt, owes its present authority, if not its origin, to the regard to the peace of society, and a desire to protect the individual from arbitrary aggression." In other words, until the lands so held are escheated by the State, the alien has complete dominion over them. In accord with this authority are *Fairfax v. Hunter*, 7 Cranch, 603, 3 L. Ed., 453; *Cross v. De Valle*, 1 Wall., 5, 17 L. Ed., 515; *People v. Conklin*, 2 Hill (N.Y.), 67; *Wadsworth v. Wadsworth*, 12 N. Y., 376; *Jones v. McMasters*, 20 How., 8, 15 L. Ed., 805; *Davis v. R. Co.*, 131 Mass., 273, 41 Am. Rep., 221; *Raccouillat v. Sansevain*, 32 Cal., 376; *Gray v. Kauffman*, 82 Tex., 65, 17 S. W., 513; *Norris v. Hoyt*, 18 Cal., 217; *Chattanooga, etc., R. Co. v. Evans*, 66 Fed., 809, 14 C. C. A., 116. In *Williams v. Wilson*, Mart. & Y., 248, it was ruled by this court "that conveyances to aliens invest them with the title

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they purport to convey, subject only to be divested by the government upon office found; and, *semble*, such alien may convey by deed or will, and the grantee or devisee will take the same estate he had, subject to the like right of the State." This case is referred to with approval in the latter one of *Baker v. Shy*, 9 Heisk., 85.

The same principle was applied in the case of a turnpike company which it was insisted had exceeded the limit of its power in contracting for land. In *Barrow v. Nashville, etc., Turnpike Co.*, 9 Humph., 304, it was insisted by a grantor that a deed made by him to the company conveyed land which the grantee under its charter, had no power to purchase. To this contention, overruling the chancellor, this court said: "It is a matter of no concern to him [the grantee] whether the corporation exceeded its powers or not. The State, from which they received their existence and by whose authority they exercise their powers, may institute proceedings against them for this excess of power."

The exact question presented here was examined in the cases of *Fritts v. Palmer*, *supra*, and *Seymour v. Slide & Spur Gold Mines*, 153 U. S., 523, 14 Sup. Ct., 847, 38 L. Ed., 807, in each of which it was insisted that the foreign corporation in question had failed to meet certain statutory requirements in order to enable it to purchase real estate in Colorado, and in each case it was held that only the State could raise the question of incapacity, and until it was so raised in some proper form, the corporation could accept and pass title.

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But it is insisted that this court has announced in numerous cases a contrary view, and the doctrine of *stare decisis* is invoked to sustain the legal conclusion reached by the trial judge. We think, however, when the cases so relied upon are examined, it will be found that they fall short of sustaining that contention.

The first of these is the leading case of *Cary-Lombard Lumber Company v. Thomas*, 92 Tenn., 585, 22 S. W., 743. That was a suit by a nonresident corporation doing business in the State without having complied with the act of 1891. The company was engaged in dealing in lumber through an agent in the city of Memphis, and, while so engaged, sold and delivered from one of its yards in that city lumber used in the construction of a house being erected by Mrs. Thomas. It had failed to comply with the terms of chapter 122, page 264, of the Acts of 1891, which, as has been already seen, denounced every business transaction of a noncomplying nonresident corporation as unlawful and punishable by fine. So it was, this court, under the express terms of that act, could not have done otherwise, when this corporation came to seek an enforcement of its claim, than to repel it. In *New York, etc., Bldg. & Loan Ass'n v. Cannon*, 99 Tenn., 345, 41 S. W., 1054, there was an effort by a noncomplying foreign corporation to enforce a mortgage which had been executed by a citizen of this State upon property situated in this State to secure a note for money loaned, and it was held by this court the suit could not be maintained.

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But it is to be noted that the mortgage in this case was but an incident—a mere security for the loan, which, under the act of 1891, was unlawful. The note being illegal and unenforceable, it followed, of necessity, that the mortgage could not be foreclosed. The same is true with regard to the case of *Gilmer v. Savings & Loan Company*, 103 Tenn., 272, 52 S. W., 851. There a mortgage was taken by a noncomplying foreign corporation to secure a loan made by it to a borrower. Afterwards, however, the company filed its charter for registration, and in all respects complied with the statute. Having done this, in view of the invalidity of the first transaction, the company sought to cure it by the taking of the second mortgage. Upon a bill filed to foreclose, it was held that the first mortgage was invalid because at the date of the loan, the company had not qualified itself to do business in the State and the court declined to enforce the second mortgage because it was obtained under false pretenses. In the case of *Harris v. Water & Light Co.*, 108 Tenn., 245, 67 S. W., 811, there was involved simply the question as to the right of the members of the firm to sue on a firm claim where one of the members of that firm was a foreign corporation which had failed to comply with the provisions of chapter 31, page 44, of the Acts of 1877, and chapter 122, page 264, of the Acts of 1891.

So it will be seen that all of these cases are clearly distinguishable from this, in that they involved business transactions between noncomplying foreign corpora-

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tions and citizens of our State. These transactions were within the letter of the statute, and were denounced by it as offenses against the law. No one of them raises the question we have here. In the present case, however, we have a purchase of property not so denounced, and a third party, with no interest whatever in the conveyance made to the Louisville Property Company, undertaking to protect itself of its injurious act, by insisting that the party injured has no status, under our laws, either to acquire real estate, or to obtain redress for injury to it, when clothed with the apparent title. We do not think that such a party can successfully maintain this defense. We are satisfied the present case falls in line with those cases which hold that the power of inquest under the conditions presented in this record lies alone with the sovereign.

Before closing this part of the discussion, it is well to refer to a suggestion made at the bar by the counsel of the defendant in error to the effect that the charter of the plaintiff in error gave it the power to acquire and dispose of property, and that it was in fact carrying on business, within the terms of the statute, in making the purchase of these lots. To this suggestion two answers can be made, either of which we think conclusive: In the first place, neither the charter of the plaintiff in error, nor any statement as to the rights acquired by virtue of that charter, forms a part of the finding of facts by the circuit judge in the case, and we are pre-

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cluded from going into the record for the purpose of ascertaining facts either to sustain or repel this suggestion. There is nothing in the finding of the trial judge which warrants the contention.

In the second place, it will be seen that all of these statutes make a plain distinction between the acquisition of property and the carrying on of business. The lawmakers evidently contemplated that a foreign corporation might enter the State to engage in business, and yet not seek to acquire property, or might buy property, and still not do business. Under them, it would be a strained and unnatural construction to hold that a purchase of real estate, as in the present case, by such a corporation, was, in effect, carrying on business in the State.

We hold, therefore, that the circuit judge was in error in the legal conclusion which he reached, and this results in the reversal of his judgment. We find, however, that he ascertained the amount of the damage inflicted upon the property of the plaintiff in error, and a judgment will be entered here for the amount so found to wit, the aggregate sum of \$3,050.

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TRADERS' INSURANCE COMPANY v. DOBBINS & EWING.

(Nashville. December Term, 1904.)

1. **CHARGE OF COURT.** Evidence sufficient to justify submission of question as to custom.

In an action on a policy of fire insurance, testimony that it was the usage of the retail hardware business to handle dynamite justifies a submission to the jury of the question whether it was customary in the retail hardware business to keep dynamite in stock. (*Post*, pp. 231, 232.)

2. **CUSTOM.** Need not extend to the whole State, but only to the region where sought to be applied.

It is not necessary that a custom or usage should extend to the whole State. It is sufficient that it is generally recognized and observed by those engaged in the kind of transactions to which it applies within the region where it is claimed to exist. (*Post*, p. 232.)

Cases cited and approved: *Rastetter v. Reynolds*, 160 Ind., 133; *Gleason v. Walsh*, 43 Me., 397; *Harper v. Pound*, 10 Ind., 32, 36; *Grant v. Insurance Co.*, 5 Ind., 23; *Spears v. Ward*, 48 Ind., 541; *Cox v. O'Riley*, 4 Ind., 368, 373; *Morningstar v. Cunningham*, 110 Ind., 328, 334; *Insurance Co. v. Milner*, 23 Ala., 420, 427, 428.

3. **FIRE INSURANCE.** Dynamite may be kept under permission to keep "such other merchandise as is usually kept," when usage is shown.

Under a policy of fire insurance prohibiting in its general provisions the keeping of dynamite, with a rider or slip attached thereto insuring enumerated articles and "such other merchandise as is usually kept for sale in a retail hardware store," with expressed permission to keep kerosene oil, gunpowder and a gasoline stove the insured has a right to carry in stock

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dynamite not exceeding the quantity shown to be usual or customary among retail hardware merchants in his region. (*Post*, pp. 232-239.)

Cases cited and approved: *Insurance Co. v. Hughes*, 10 Lea, 461; *Insurance Co. v. Ayers*, 88 Tenn., 728; *Hoffman v. Insurance Co.*, 88 Tenn., 735; *Insurance Co. v. Insurance Co.*, 102 Tenn., 264; *Vette v. Insurance Co.*, 30 Fed., 668; *Kratzenstein v. Assurance Co. (N. Y.)*, 22 N. E., 221, 5 L. R. A., 799, 801; *Allen v. Insurance Co.*, 85 N. Y., 473; *Hermann v. Insurance Co.*, 81 N. Y., 184; *Dilleber v. Insurance Co.*, 69 N. Y., 256, 263; *Hoffman v. Insurance Co.*, 32 N. Y., 405; *Badenfeld v. Association*, 12 L. R. A., 263; *Insurance Co. v. Mund*, 102 Pa., 89; *Burkhard v. Insurance Co.*, 102 Pa., 262; *Yoch v. Insurance Co. (Cal.)*, 44 Pac., 189, 34 L. R. A., 857; *Insurance Co. v. Degraff*, 12 Mich., 124; *Liverpool & London v. Orr (Miss.)*, 56 Am. Rep., 810, 811; *Collins v. Insurance Co. (N. C.)*, 28 Am. Rep., 322; *Insurance Co. v. Fleming (Ark.)*, 44 S. W., 464, 39 L. R. A., 789, 67 Am. St. Rep., 900; *Maril v. Insurance Co. (Ga.)*, 23 N. E., 463, 30 L. R. A., 835, 51 Am. St. Rep., 102; *Faust v. Insurance Co.*, 91 Wis., 158; *Stout v. Assurance Co.*, 12 Fed., 554; *Plinsky v. Insurance Co.*, 32 Fed., 47; *Pindar v. Insurance Co. (N. Y.)*, 93 Am. Dec., 544; *Barnum v. Insurance Co.*, 97 N. Y., 188; *Insurance Co. v. Taylor*, 5 Minn., 492; *Mascott v. Insurance Co.*, 68 Vt., 253.

Case cited, distinguished, and approved: *Insurance Co. v. Kuhn*, 12 Heis., 515.

FROM MAURY.

Appeal from the Circuit Court of Maury County.—
SAM HOLDING, Judge.

Insurance Co. v. Dobbins.

G. T. HUGHES and H. P. FIGURES, for Insurance Co.

EV. H. HATCHER and W. S. FLEMING, for Dobbins & Ewing.

MR. JUSTICE NEIL delivered the opinion of the Court.

The Traders' Insurance Company had a general form of policy, which, among other provisions, contained the following: "This entire policy, unless otherwise provided by agreement endorsed herein or added hereto, shall be void . . . if (any usage or custom of trade to the contrary notwithstanding) there be kept, used or allowed, on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek-fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorous or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard," etc.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions, as may be endorsed hereon, or added hereto, and no officer, agent, or other representative of this company, shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon, or added hereto, and as to such provisions and conditions no officer, agent or representative, shall have such power, or

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be deemed or held to have waived such provision or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It was the custom of the company in adopting this general form of policy to different kinds of business, to attach thereto a "rider," or printed slip, which was varied to suit the special kind of business.

The defendants in error were hardware merchants in Columbia, this State, and when they insured their stock with the plaintiff in error the general form of policy above referred to was applied to that business by attaching to the policy the following rider or slip, known as "the hardware store form." viz.: \$2,000 "on stock of shelf and heavy hardware, iron, steel, cutlery, stoves, nails, furniture, sporting goods, tinware, and on such other merchandise as is usually kept for sale in a retail hardware store." Permission is then given to keep kerosene oil of a specified grade; also twenty-five pounds of gunpowder, in close tin cans; and a gasoline stove for exhibition purposes. The rider closes with the provision: "This slip is hereby attached to and (made) a part of policy number 1065518 of the Traders' Insurance Company of Chicago, Illinois."

At the time the policy was issued the defendants in error were accustomed to keep in stock not exceeding fifty pounds of dynamite, and they continued to do so up to the date of the fire. When the fire occurred they

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had on hand twenty or thirty pounds of this substance, and it exploded during the progress of the fire; this explosion having been caused by the walls or some timbers falling upon the dynamite.

The company refused payment, and is now defending on the ground that the above-mentioned dynamite was kept in stock.

Evidence was introduced in the court below to the effect that it was usual in the retail hardware business to keep a small amount of dynamite in stock, and sell it over the counter.

The circuit judge charged the jury, in effect, that, if such was the usage in the retail hardware business, then the defendants in error did not violate the terms of the policy by keeping such goods.

Judgment having been rendered against the company, it appealed, and has assigned errors.

The errors assigned are, in substance, (1) that there was no competent evidence of such usage of trade, and (2) that his honor incorrectly construed the policy.

Both assignments must be overruled.

As to the first point: The witnesses testified generally that they knew that it was the usage of the business to so handle dynamite. On being pressed in cross-examination, they were able to specify only the towns of Columbia, Pulaski, Lewisburg, Lawrenceburg, Fayetteville, Shelbyville, and the city of Nashville. This covered seven counties of the State. One of the witnesses also testified without objection that he had been told by

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“drummers” that they sold it to all of the retail hardware stores.

Even laying aside the last item of evidence, we think the testimony is sufficient to show the requisite generality to make the usage good. It is not necessary that it should extend to the whole State. It is sufficient that it is generally recognized and observed by those engaged in the kind of transactions to which it applies within the region where it is claimed to exist, and it is not essential that it be observed in every individual transaction. 29 A. & E. Ency. Law (2d Ed.), page 392 and note 3, citing *Rastetter v. Reynolds*, 160 Ind., 133, 66 N. E., 612; *Gleason v. Walsh*, 43 Me., 397. See, also, *Harper v. Pound*, 10 Ind., 32, 36; *Grant v. Lexington, etc., Ins. Co.*, 5 Ind., 23, 61 Am. Dec. 74; *Spears v. Ward*, 48 Ind., 541; *Cox v. O'Riley*, 4 Ind., 368, 373, 58 Am. Dec., 633; *Morningstar v. Cunningham*, 110 Ind., 328, 334, 11 N. E., 593. 59 Am. Rep., 211; *Fulton Ins. Co. v. Milner*, 23 Ala., 420, 427, 428. And it is settled that insurance companies are bound to inform themselves of the usages of the particular business insured, and they are presumed to know such usages. 29 Am. & Eng. Ency. Law (2d Ed.), pages 393, 394, and notes.

We are of the opinion that the evidence introduced was properly allowed to go to the jury, and that it was sufficient to support the verdict so far as concerns the point to which it was addressed. The first assignment is therefore overruled.

The second point concerns the construction of the pol-

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icy, and herein the effect of the "rider" or "hardware store form" or "slip."

It is a fundamental rule in the law of insurance that the policy shall be construed most strongly against the insurer, and liberally in favor of the insured. 1 Joyce on Insurance, section 222. In construing a condition or stipulation in a policy, doubtful and ambiguous provisions, or those in favor of the insurer, must be taken most strongly against the company. *Vette v. Clinton F. Ins. Co.* (C. C.), 30 Fed., 668. In *Kratzenstein v. Western Assurance Co.*, (N. Y.), 22 N. E., 221, 5 L. R. A., 799, 801, it is said:

"Where an insurance contract is so drawn as to be manifestly ambiguous, so that reasonable and intelligent men on reading it would honestly differ as to its meaning, the difference should be resolved against the company, because it prepared and executed the agreement and is responsible for the language used and the uncertainty thereby created;" citing *Allen v. St. Louis Ins. Co.*, 85 N. Y., 473; *Hermann v. Merchant's Ins. Co.*, 81 N. Y., 184, 37 Am. Rep., 488; *Dilleber v. Home Life Ins. Co.*, 69 N. Y., 256, 263, 25 Am. Rep., 182; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y., 405, 88 Am. Dec., 337.

And in a note to *Badenfeld v. Mass. Mut. Accident Association*, 13 L. R. A., 263, it is said:

"Where the terms of a policy are susceptible without violence of two interpretations that construction which is most favorable to the insured, in order to indemnify him against loss sustained, should be adopted," citing

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Teutonia F. Ins. Co. v. Mund, 102 Pa., 89; *Burkhard v. Travellers' Ins. Company of Hartford*, 102 Pa., 262, 48 Am. Rep., 205; *Hoffman v. Aetna F. Ins. Co.*, supra.

With this rule of construction in view, it seems there can be no real difficulty in reaching a correct conclusion as to the meaning of the policy of insurance under examination in the present case. The general form contains the provision that dynamite and certain other substances shall not be kept by the dealer, but contains another provision that the terms of this general form may be modified by additional agreements made by the company or its agents and attached to the policy. There was such an additional agreement, which provided that the policy should cover such merchandise as is usually kept for sale in retail hardware stores and the evidence shows that dynamite, in the quantities carried by the defendants in error, was such merchandise. Under this statement of the matter, which is a correct statement of the terms of the policy, it seems there could be no real doubt that the defendants in error did not violate the terms of the policy when they carried the small amount of dynamite referred to in stock.

We are invited by counsel for plaintiff in error to a special consideration of the following words used in the hardware clause: "On stock of shelf and heavy hardware, iron, steel, cutlery, stoves, nails, furniture, sporting goods, tinware, and on such other merchandise as is usually kept for sale in a retail hardware store." Special stress is laid by counsel on the words "such other mer-

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chandise as is usually kept," etc. It is insisted that the rule of *ejusdem generis* applies, and that, therefore, it was meant only to include goods of the kind already mentioned, and was not meant to enlarge or extend the scope of the policy beyond the character of goods previously mentioned. We do not think this is the correct view of the words referred to. It is certainly not the view taken of the expression "such as" in standard dictionaries. In the Century Dictionary and Cyclopedia it is said. "'Such' always implies from its sense a comparison with another thing, either unexpressed as being involved in the context (as we have never before seen such a sight [sc. as this is]; we cannot approve such proceedings [sc. as these are]; such men [sc. as he is] are dangerous), or expressed, such being then followed by as or that before the thing which is the subject of comparison (as, we have never had such a time as the present; give your children such precepts as tend to make them wiser and better; the play is not such that I can recommend it).'" Examples given under this definition are: "There is no place in Europe so much frequented by strangers, whether they are such as come out of curiosity or such who are obliged to attend the court of Rome on several occasions." Addison, Remarks on Italy (Works, Ed. Bohn, 1, 420). Again: "Trade brings men to look each other in the face, and gives the parties the knowledge that these enemies over sea or over the mountain are such men as we, who laugh and grieve, who love and fear as we do." Emerson, War. The first or primary definit-

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ion of the word "such" given in the authority above referred to is, "of that kind; of like kind or degree; like; similar." Following this definition is a short essay upon the expression "such as," which we have quoted above, and the two examples which we have copied, along with numerous other instances of the same kind. There is a secondary meaning of the word "such," which is given as "the same as previously mentioned or specified;" "not other or different." We are of opinion, however, that the primary meaning of the word is the correct one to be applied in the present case, especially as the word "such" is followed by the word "as." This meaning is strengthened by the use of the word "other." The words being read together as they stand in the clause, "and such other merchandise as is usually kept for sale in a retail hardware store," mean articles in addition to those already mentioned; their kind being only limited by the provision that they shall be of a sort usually kept in retail hardware stores. We really think there is no doubt about the correctness of this construction.

Counsel have discussed to considerable extent in the able briefs filed the question at large when the general inhibitions contained in fire policies as to the class of goods will be controlled by the description of the stock insured in the special policy under examination. It is perhaps, not necessary that we should go further into this matter, but we shall refer to some of the authorities bearing upon the point.

In 1 May on Insurance, section 233, it is said:

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"While, however, as we have seen, if the policy insures only one class of articles, and expressly excludes other classes, the keeping of an article in the excluded class, although it be usually kept with the class of goods actually insured, will avoid the policy, yet if the policy describe property, the stock insured, as 'such as is usually kept in a store,' this qualification enlarges the scope of the policy, so that it will attach to and cover memorandum articles, or any articles enumerated in the non-insured classes. The keeping of the memorandum articles is usually made to avoid the policy, unless otherwise provided therein. And this qualification of the description of the subject-matter is equivalent to a provision in the policy whereby the memorandum articles are permitted to be kept and insured. So where the policy is upon merchandise 'such as is usually kept in country stores.' Under such a description of the risk all articles such as can be shown to be usually kept in country stores are covered and protected by the policy, although they may be enumerated in the second '(prohibited articles)' classes of risks. If fireworks are usually kept in confectionery stores, the keeping of them will not violate a policy covering the usual stock of such stores, although they are expressly prohibited in the printed provisions."

As fully sustaining the foregoing, we cite the following authorities: *Yoch v. Ins. Co.* (Cal.), 44 Pac., 189, 34 L. R. A., 857; *Niagara Ins. Co. v. Degraff*, 12 Mich., 124; *Liverpool & London v. Orr* (Miss.), 56 Am. Rep., 810, 811; *Collins v. Ins. Co.* (N. C.), 28 Am. Rep., 322;

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Ins. Company v. Fleming (Ark.), 44 S. W., 464, 39 L. R. A., 789, 67 Am. St. Rep., 900; *Maril v. Ins. Company* (Ga.), 23 S. E., 463, 30 L. R. A., 835, 51 Am. St. Rep., 102; *Faust v. Ins. Co.*, 91 Wis., 158, 62 N. W., 883, 30 L. R. A., 783, 51 Am. St. Rep., 876; *Stout v. Commercial Assur. Co.* (C. C.), 12 Fed., 554; *Plinsky v. Germania Ins., Co.* (C. C.), 32 Fed., 47; *Pindar v. Ins. Co.* (N. Y.), 93 Am. Dec., 544; *Barnum v. Ins. Co.*, 97 N. Y., 188; *Phoenix Ins. Co. v. Taylor*, 5 Minn., 492 (Gil. 393); *Mascott v. Ins. Company*, 68 Vt., 253, 35 Atl., 75.

The subject is quite fully discussed in the above cases, most of which are easily accessible, and we need not pursue the subject further. Some observations are made in the briefs of counsel for plaintiff in error concerning the controlling nature of writing entered upon the face of a policy as distinguished from a subsequent agreement typewritten or printed and pasted thereon. There is no real difference in principle.

We are referred by counsel for plaintiff in error to *People's Ins. Co. v. Kuhn*, 12 Heisk., 515, as an authority in favor of its contention. That case, however, can give to plaintiff in error no aid, for two reasons. In the first place, the turning point in the case was a clause which appeared in the policy there under construction, which does not appear in the present policy, viz.: "The use of general terms, or anything less than a distinct, specific agreement, clearly expressed, and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." Sec-

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only the principle of construction adopted in that case has been discredited in later cases. See *Insurance Co. v. Hughes*, 10 Lea, 461; *Insurance Co. v. Ayers*, 88 Tenn., 728, 13 S. W., 1090; *Hoffman v. Insurance Co.*, 88 Tenn., 735, 14 S. W., 72; *Royal Ins. Company v. Vanderbilt Ins. Co.*, 102 Tenn., 264. 52 S. W., 168. A short quotation from the syllabus of each of these cases, correctly stating the substance of the case, will now be given. In the first-cited case it is said: "The rule for the construction of contracts for insurance is that, having indemnity for their object, they will be liberally construed to that end." In the second case it is said: "The sole object of insurance being indemnity against loss, any ambiguity in the policy will be resolved against the insurer, so as to effectuate that purpose." In the third-cited case it is said: "That construction of an insurance policy will be adopted, where its language is of doubtful import, which is most favorable to the assured, and best secures to him that indemnity against loss, which is the sole object of insurance." In the last-cited case, it is said in the body of the opinion: "It is well settled that when a policy of insurance contains contradictory provisions, or has been so framed as to make necessary a judicial construction, its own words will be taken most strongly against it."

For the reasons above given, we are of opinion that there was no error in the action of the court below, and the judgment of that court is affirmed.

 Railroad v. Dillard.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY v. E. C.
DILLARD.*

(*Nashville.* December Term, 1904.)

1. RAILROADS. Conductor on a passenger train is a fellow servant with a brakeman on a freight train.

The conductor on a passenger train has no control over a brakeman on a freight train, and is charged with no personal duty of the master towards such brakeman, and is not engaged in a separate department of the railroad service, and is, therefore, a fellow servant with such brakeman, and not a vice principal over him.

Cases cited and approved: Railroad v. Bowler, 9 Heis., 866; Guthrie v. Railroad, 11 Lea, 372; Railroad v. Handman, 13 Lea, 423, 429; Railroad v. Collins, 85 Tenn., 227; Railroad v. Lahr, 86 Tenn., 335, 341; Railroad v. Martin, 87 Tenn., 398; Mining Co. v. Davis, 90 Tenn., 711, 719, 720; Railroad v. Northington, 91 Tenn., 56; Railroad v. Spence, 93 Tenn., 173; Railroad v. Wright, 100 Tenn., 56; Railroad v. Lawson, 101 Tenn., 408, 409; Howard v. Railroad (C. C.), 26 Fed., 837, 842; Railroad v. Edwards, 111 Tenn., 31; Railroad v. Andrews, 1 C. C. A., 636; Kerlin v. Railroad (C. C.), 50 Fed., 186-188; Railroad v. Needham, 11 C. C. A., 56; Railroad v. Mase, 11 C. C. A., 63; McMaster v. Railroad, 65 Miss., 264, 268; Railroad v. Devinney, 17 Ohio St., 197.

Cases cited, distinguished, and disapproved: Madden v. Railroad, 28 W. Va., 617, 618; Daniel v. Railroad, 36 W. Va., 397, 411, 414, 417, 419; Railroad v. Edmonds (Ky.), 64 S. W., 727.

*As to when conductor is deemed to be a coservant of other railway employees, see note to Jackson v. Norfolk & W. R. Co. (W. Va.), 46 L. R. A., 337.

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2. **SAME.** Employees in different departments are not fellow servants; instances.

Railroad employees in separate or different departments of the railroad service are not fellow servants; and under this doctrine, it has been held that a track repairer is not a fellow servant of the crew of a train running upon the track (*Haynes v. Railroad*, 3 Cold., 222); that a section foreman is not a fellow servant of the train crew (*Railroad v. Carroll*, 6 Heis., 347, 361); that a watchman is not the fellow servant of an engineer (*Railroad v. Robertson*, 9 Heis., 276); that a telegraph operator at a way station is not a fellow servant of the conductor of a train (*Railroad v. DeArmond*, 86 Tenn., 73); that a car inspector is not a fellow servant of the crew of a switch engine (*Taylor v. Railroad*, 93 Tenn., 307); that a depot agent is not a fellow servant of the conductor of a train (*Railroad v. Jackson*, 106 Tenn., 438); that a bridge crew is not a fellow servant of the crew of a freight train (*Freeman v. Railroad*, 107 Tenn., 340); and that an engineer is not a fellow servant of a telegraph operator (*Railroad v. Bentz*, 108 Tenn., 670). (*Post*, pp. 245, 246.)

3. **MASTER AND SERVANT.** Servant assumes risk of danger from negligence of a fellow servant, when.

Where the master has exercised due care in the selection of his servants, the danger arising from the negligence of a fellow servant is a risk voluntarily assumed by one upon entering the service, and for which it is presumed that he is satisfactorily compensated. (*Post*, pp. 253, 254.)

FROM SUMNER.

Appeal from the Circuit Court of Sumner County.—B. D. BELL, Judge.

Railroad v. Dillard.

SEAY & SEAY, for Railroad.

B. F. PROCTOR and J. D. G. MORTON, for Dillard.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the circuit court of Sumner county to recover damages for an injury inflicted upon the foot of the defendant in error in a collision that occurred in November, 1902, at Hendersonville, on the line of the plaintiff in error, between a freight train and a passenger train. There were verdict and judgment in the court below, and the railway company, after motion for a new trial had been overruled, appealed and assigned errors.

The defendant in error was a brakeman on the freight train. The declaration contained counts on the negligence of the train dispatcher, the negligence of the conductor of the freight train, and the negligence of the conductor of the passenger train. To the last-mentioned count—the third—there was a demurrer filed, raising the question that the conductor on the passenger train stood in the relation of fellow servant to the train crew of the freight train, and hence to the defendant in error, the brakeman on that train, and therefore the company would not be liable to him for an injury caused by the negligence of such passenger conductor. This demurrer was overruled by the circuit court judge, and his action on this matter forms the subject of the first assignment of error, which we shall now proceed to consider.

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The first assignment of error raises the question whether the conductor on the passenger train was the fellow servant of the brakeman on the freight train, or whether such conductor stood in the relation of vice principal to the brakeman.

In our latest case upon the subject (*Railroad v. Edwards*, 111 Tenn., 31, 76 S. W., 897) it is said:

"The mere superiority in dignity, grade, or compensation, in favor of one servant of a common principal over other servants is not a mark by which to distinguish whether or not the former is a vice principal. . . . The most general test is that, in order to be a vice principal, a servant must so far stand in the place of his master as to be charged in the particular matter with the performance of a duty towards the inferior, which, under the law, the master owes to such servant, as furnishing tools (*Guthrie v. Railroad*, 11 Lea, 372, 47 Am. Rep., 286), or machinery and appliances (*Railroad v. Lahr*, 86 Tenn., 335, 341, 6 S. W., 663), or giving orders with respect to work to be done by the subordinate (*Railroad v. Handman*, 13 Lea, 423, 429).

"A test frequently stated in our cases is the authority to give orders, as a vice principal, to the subordinate servant, in directing him when, where, and how to work

"Some illustrations of the foregoing are seen in the following cases: *Railroad v. Bowler*, 9 Heisk., 866; *Railroad v. Northington*, 91 Tenn., 56, 17 S. W., 880, 16 L. R. A., 268; *Railroad v. Lawson*, 101 Tenn., 408, 409,

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47 S. W., 489. In these cases a section boss was held to stand as a vice principal to the section hands under him because he had power to order them with respect to their work and also because it was his duty to see that they had proper tools with which to work. In *Railroad v. Collins*, 85 Tenn., 227, 1 S. W., 883, and *Railroad v. Martin*, 87 Tenn., 398, 10 S. W., 772, 3 L. R. A., 282, it was held that the engineer was the vice principal of the brakeman on a train, when, in the absence of the conductor, he had power to give the brakeman orders in respect to his work, but otherwise not; and in *Railroad v. Wright*, 100 Tenn., 56, 42 S. W., 1065, it was held that the conductor stands as vice principal to all of the train force, because they are all under his orders." To same effect, *Railroad v. Spence*, 93 Tenn., 173, 23 S. W., 211, 42 Am. St. Rep., 907.

The conductor of the passenger train in question, however, had no power to give orders to the brakeman on the freight train. This ground for adjudging the relation of vice principal and of servant thereunder did not, therefore, exist.

Was the conductor of the passenger train charged with any of the personal duties of the master towards the brakeman on the freight train? Was he charged with the duty of furnishing tools and appliances or a safe place to work? There is nothing to show that he was charged with such duties.

Was the passenger conductor in charge of, or engaged in, a separate department of the master's business?

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In this State the departmental doctrine is recognized in railway cases. The grounds on which it rests are thus stated in *Coal Creek Mining Company v. Davis*, 90 Tenn., 711, 719, 720, 18 S. W., 387, 389:

"The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that by reason of this division a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives the servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation. This rule has not been extended by us beyond railroad corporations, and we are not disposed to extend it further than to the class of employments to which it has been heretofore limited."

Under this doctrine it has been held that a track repairer was in a different department from, and hence not the fellow servant of, the crew of a train running upon the track (*Haynes v. Railroad Co.*, 3 Cold., 222); for the same reason, that a section foreman was not the fellow servant of the train crew (*Railroad v. Carroll*, 6 Heisk., 347, 361); that a watchman was not the fellow servant of an engineer (*Railroad v. Robertson*, 9 Heisk., 276); a telegraph operator at a way station, not the fellow servant of the conductor of a train (*Railroad Co. v. De Armond*, 86 Tenn., 73, 5 S. W., 600, 6 Am. St. Rep.,

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816) ; a car inspector, not the fellow servant of the crew of a switch engine (*Taylor v. Railroad Co.*, 93 Tenn., 307, 27 S. W., 663) ; a depot agent, not the fellow servant of the conductor of a train (*Railroad Co. v. Jackson*, 106 Tenn., 438, 61 S. W., 771) ; a bridge crew, not the fellow servant of the crew of a freight train (*Freeman v. Railroad*, 107 Tenn., 340, 64 S. W., 1) ; and an engineer, not the fellow servant of a telegraph operator (*Railroad Co. v. Bentz*, 108 Tenn., 670, 69 S. W., 317, 58 L. R. A., 690, 91 Am. St. Rep., 763).

We have no case holding that separate trains constitute separate and distinct departments of railway service, nor do we think they can be so treated on principle. The reason underlying the departmental doctrine resides in, as already stated, the need of consociation to enable coemployees to judge of the caution, diligence, and efficiency of each other, in order that they may properly protect themselves against negligence. In distinct departments of the service they are regarded as constantly working apart from each other, without the opportunity of mutual observation and criticism. This reason, however, cannot be held to apply to the crews of different trains running upon the tracks of the same company. It does not appear that such crews are permanently attached to any special trains. Moreover, even if not associated upon the same train, the crews of each train, in passing and repassing and in mingling with each other in the handling of traffic in the course of their work, necessarily have an opportunity of judging to some extent

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how the various trains are managed by the people who man them. At best, the amelioration of the dangers incident to a hazardous business cannot be very great for the servants of a common master, even when they work in the same department, where the number of such coemployees is great, as very often happens in the railway business, and in other kinds of business.

If the conductor of the passenger train in question had no control over the brakeman on the freight train, or was not charged with any duty of the master towards him, as in the furnishing of tools and appliances or a safe place to work, or was not in a different department of the master's service (and we have seen that he had no such powers and bore no such relation), which are the only exceptions our cases recognize as taking coemployees out of the class of fellow servants, then the said conductor and brakeman were fellow servants, and the master was not liable for the injuries inflicted upon one by the negligence of the other. This conclusion seems inevitable, on principle.

The weight of authority likewise supports this conclusion. *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A., 191, 50 Fed., 728, 1 C. C. A., 636; *Kerlin v. Chicago, etc., R. Co.*, (C. C.), 50 Fed., 186-188; *St. Louis, etc., R. Co. v. Needham*, 63 Fed., 107, 112, 11 C. C. A., 56, 25 L. R. A., 837; *Northern Pac. R. Co. v. Mase*, 63 Fed., 114, 11 C. C. A., 63; *McMaster v. I. C. R. Co.*, 65 Miss., 264, 268, 4 South., 59, 7 Am. St. Rep., 654, 657; *Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St., 197. There are

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other cases holding a contrary view. *Madden's Adm'r v. R. Co.*, 28 W. Va., 617, 618, 57 Am. Rep., 695, 696, 697; *Daniel's Adm'r v. Chesapeake, etc., R. Co.*, 36 W. Va., 397, 411, 414, 417, 419, 15 S. E., 162, 32 Am. St. Rep., 870, 882, 885, 888, 889, 16 L. R. A., 383, 387, 389, 390; *L. & N. R. Co. v. Edmonds' Adm'x* (Ky.), 64 S. W., 727. The Kentucky case is based, in substance, on the ground that separate trains constitute separate departments, or that they are equivalent thereto because the crews of such separate trains are "so disconnected as to not give the one a right or opportunity for controlling, admonishing, or even observing the manner of the colaborer doing his work." We have already held this distinction inadmissible, in a former part of this opinion. The substance of the West Virginia cases (both collision cases), as we understand them, is that it is the personal duty of the master to keep the way clear, and that each conductor in charge of a train should be regarded as representing the master for that purpose. We think this view is fully met by the reasoning of Sanborn, J., in *St. L., etc., Ry. Co. v. Needham*, supra.

In that case it appeared there was a rule of the company which provided: "That conductors of all trains, when approaching meeting points where they are to take the siding, must go to the forward part of trains and attend to the switch in person. On train leaving the siding they must set up switch for the main track in person. Conductors must not assign this duty to any one, but must attend to it in person in every instance."

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The decedent was a fireman on a passenger train running south from Little Rock, Ark., December 16, 1889. About two hours before this passenger train arrived at Alexander, a station ten miles south of Little Rock, the conductor of a construction train of the railroad company caused the switch of the spur track at that place to be opened, ran his train upon that track and then ran it north to Little Rock, and left the switch open, when it was his duty to close it. The passenger train ran into the open switch, and Mr. Needham was killed.

In answer to the contention that it was the personal duty of the master to make and keep the way safe, the court, among other things, said:

"The line of demarkation between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance.

"The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad to-

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gether constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but when this duty is performed, the duty rests upon the servant to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch, and to run his train through it upon the spur track. He did so. It then became his duty to take his train off the spur track and to close the switch. He took his train off and proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation, or repair of the railroad, but in its operation. The railroad was safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would anni-

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hilate the now settled rule of liability for the negligence of fellow servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars and every appurtenance of the railroad, that every place upon it should at all times be safe, and no negligence of any employee could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury every place in which an injury is inflicted is unsafe. The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine?

"In our opinion, the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation—a duty of the servant—for negligence in the discharge of which another servant of the same master, engaged in operating a train over the same railroad, cannot recover."

And it is well said by Brewer, J., in *Howard v. Denver, etc., Ry. Co.* (C. C.), 26 Fed., 837, 842—a collision case:

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"It will not do to say that, because Ryan's engine was in the way and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a safe place for the employee to work in and upon. The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employes. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employee of the machinery shall create danger. Neither can it be said that Ryan and decedent were engaged in a different class of work. Both were employed in the movements of the trains—the same kind of service. True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But being engaged in the same kind of service, and on the same division, they must naturally have often been thrown into contact and had ample opportunities for mutual supervision. To subdivide beyond the class of the service, into the place of work, would carry the exception beyond well-recognized limits. It would make the train men on one train not fellow servants with those on another; the carpenters and ma-

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chinists in one room strangers in service to those of another; one gang of section men not coemployees with another—and all because at the time their places of work happened to be different.”

To admit the qualification into the law of master and servant sought to be introduced in this case, making the conductor of one train the vice principal of employees upon another train, thereby declaring each train to constitute a separate department of the service, would practically break down the whole law of fellow servants as previously understood in this State. The law as it exists in this State is not unfair either to the master or the servant. While on the one hand, it seems, on a casual view, that it is a hardship upon the servant to deny him relief for an injury inflicted upon him by the negligence of a fellow servant in whose selection he had no voice, yet it seems equally hard to make the master liable to one of his servants for the negligence of another servant when he (the master) has exercised due care in selecting such servant. What more could he do? It is impossible that he should supervise and control every act of his servants. Yet if he is made liable to each of his servants for every act of all his servants in the course of the employment—and there may be and there often are thousands of them—the law then places upon him a duty which every one knows that no one can discharge. The true and just view is that expressed in our cases—that, after the master has exercised due care in the selection of his servants, the danger arising from the negligence

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of a fellow servant is a danger which one going into the service voluntarily assumes, and it is a risk for which it is presumed he is satisfactorily compensated by the larger wages he can earn in the service than in other employments. In this State we have already narrowed the field covered by the law of fellow servants by withdrawing from it cases wherein one servant of the master is set over other servants, with power to command them in their work, and by the introduction of the departmental doctrine as construed and applied in our previous cases, and have added cases arising under these to the master's generally recognized duty of furnishing safe tools and appliances, a safe place to work, and the selection of reasonably competent servants. We deem it inexpedient to make any further extension than may follow from a natural and reasonable development of the principles already adjudged. We do not think the case now put before us lies within the path of that development.

We are of opinion, therefore, that the circuit judge committed error in not sustaining the demurrer to the third count of the declaration, and the first assignment is sustained.

Other assignments of error are disposed of in a memorandum opinion filed with the record, and need not be further referred to here.

Reverse and remand.

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UNION BANK & TRUST COMPANY *et al.* v. FRED W. WOLF
COMPANY *et al.**

(Nashville. December Term, 1904.)

1. **FIXTURES.** Rights of innocent subsequent mortgagee prevail over rights of seller of machinery sold under conditional sale, when.

Where machinery for an ice factory was purchased under conditional sale, with title retained in the seller until paid for, a secret condition known only to the seller and the buyer, which machinery was bolted to the purchaser's building and connected with the other machinery already in the place at the time of the contract, and all so connected together as to form a complete and homogeneous system, and intended to be permanently attached to the freehold, with the knowledge, consent, and aid of the seller, subject to the failure to comply with the condition of payment; and while the machinery so purchased could be taken out of the building without serious injury thereto, but not without seriously impairing the efficiency of the plant, yet such machinery would be regarded as a part of the real estate, as between the seller thereof and a subsequent mortgagee of the plant without notice of the seller's rights.

Cases cited and approved: Degraffenreid v. Scruggs, 4 Hum., 451; Childress v. Wright, 2 Cold., 350; Cannon v. Hare, 1 Tenn. Chy., 22; Johnson v. Willingby, 3 Tenn. Cas., 338; Malone v. State, 11 Lea, 701; Johnson v. Patterson, 13 Lea, 626; Hunt v. Iron Co., 97 Mass., 279; Thompson v. Vinton, 121 Mass., 139; Bank v. Exeter Works, 127 Mass., 542; Prince v. Case, 10 Conn., 375; Landon v. Platt, 34 Conn., 517; Powers v. Dennison, 30 Vt., 752;

*As to effect of agreement to prevent fixtures from becoming part of realty, including rights of mortgagees, see note to Muir v. Jones (Or.), 19 L. R. A., 441.

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Davenport v. Shants, 43 Vt., 546; Tibbetts v. Horne, 65 N. H., 242; Bingholff v. Munzenmaier, 20 Iowa, 513, 518, 519; Stillman v. Flenniken, 58 Iowa, 450, 454; Rowand v. Anderson, 33 Kan., 264; Climer v. Wallace, 28 Mo., 556.

Cases cited, distinguished, and approved: Gaslight Co. v. State, 6 Cold., 310; Saunders v. Stallings, 5 Heis., 65, 70-73; McDavid v. Wood, 5 Heis., 95; Cubbins v. Ayres, 4 Lea, 329; Snowden v. Association, 7 Lea, 225, 229.

2. **MAXIM.** Party whose conduct results in consequential loss must bear that loss, when.

Where one of two innocent persons must suffer, that one whose conduct or act placed it in the power of a third party to impose upon or deceive another should bear the loss. (*Post*, p. 266.)

3. **REGISTRATION.** Of all liens and incumbrances on land.

The policy of our law in respect to real estate titles is opposed to secret liens and requires that the public records shall contain the evidence of all liens and incumbrances. (*Post*, p. 266.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

STATEMENT OF FACTS MADE BY MR. JUSTICE NEIL.

Contest for priority between the seller of machinery, under a conditional sale, for an ice plant, and subsequent mortgagees of the same property, without notice, after it was attached to the plant.

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The facts, so far as necessary to be stated, are as follows:

On the twenty-fourth of January, 1899, the Fred W. Wolf Company entered into a contract with the Consumers' Ice, Coal & Cold Storage Company, whereby the former sold to the latter machinery to the value of \$14,600, payable in installments, evidenced by sundry promissory notes. By the terms of the contract the machinery was to remain the property of the selling company paid for. There still remains unpaid a balance of about \$1,800.

The machinery consisted of a condenser, an engine, oil trap, all very heavy articles, and sundry pipes, necessary for the operation of an ice factory. The condenser and engine were placed upon brick foundations and bolted thereto. The oil trap was likewise bolted to the floor. The pipes were connected with the condenser, and thence, through the building, with other parts of the machinery of the plant which was already in place at the time the contract was made, the latter being a part of the old equipment of the factory. All of this machinery was connected together in such a way as to form a complete and homogeneous system. The condenser, the engine, and the oil trap could be taken out of the building, without serious injury thereto, by taking off the taps and withdrawing the bolts. The other connections could then be taken out, also without serious injury thereto.

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At the time, however, that this machinery was put in place, it was intended by the parties that it should be permanently attached to the freehold, subject only to the failure to comply with the condition of payment. None of the machinery furnished under the contract and so placed in the building could be withdrawn without seriously impairing the efficiency of the plant. The machinery was sold by the Fred W. Wolf Company to the ice company for the purpose of being attached to the freehold in the manner in which it was attached, and it was so fastened thereto with the knowledge and consent and aid of the said company.

On April 1, 1901, the Consumers' Ice, Coal & Cold Storage Company executed a mortgage on the whole plant to the Union Bank & Trust Company, to secure an issue of \$15,000 of bonds, and on January 1, 1902, a second mortgage was placed thereon, in favor of the Union Bank & Trust Company, as trustees, to secure \$35,000 of bonds. These mortgages were taken upon the property in the belief that the machinery above referred to constituted a part of the plant, and that the whole was subject to mortgage. Neither the trustee nor the bondholders had any knowledge or notice of the fact that the Fred W. Wolf Company had retained title to the machinery.

The ice company having failed, the trustee was proceeding to foreclose the mortgages, whereupon the Fred W. Wolf Company brought its replevin suit to recover the machinery. Then the present bill was filed to enjoin

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that suit, and to test the question of priority between the parties.

The chancellor rendered a decree in favor of the complainants, upholding the priority of the mortgagees, and thereupon the seller, the Fred W. Wolf Company, appealed to this court, and has assigned errors.

NORMAN FARRELL, JR., for complainants.

W. H. WILLIAMSON, for defendants.

MR. JUSTICE NEIL, after making the foregoing statement of facts, delivered the opinion of the Court.

We are referred by counsel for the defendants to *McDavid v. Wood*, 5 Heisk., 95, as authority for the proposition that the intention of the parties in affixing things to land will generally determine whether, on being so attached, they become fixtures, and so a part of the realty. In that case the rule contended for is enunciated in the following language: "Look first to the intention with which the thing, which may be a fixture by annexing it to the freehold, was annexed, and if it is found that it was the intention of the owner of the freehold to make the erection for the permanent use and advantage of the land, and to remain permanently attached to the soil, such erection is to be regarded as part of the realty. But if the erection is not made with the view of a permanent addition to the land, but for purposes of trade or manufacture, the erection will be regarded as a chat-

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tel, unless a contrary intention is made to appear." In that case the contest was between the executor and heir, and the property involved a steam sawmill, with its machinery and appendages. The court held that this property was to be treated as personalty, although fixed to the land, because it appeared in the evidence that the mill was erected by four partners on the land of one, under a lease of the land, with the agreement that it was to be removed whenever they thought proper; that it was erected for manufacturing purposes, and not with the view of giving additional value to the land; that the owner of the land did not agree to its erection as a permanent improvement, and did not at any time regard it in any other light than as personal property belonging to the four partners. To the same effect, *Snowden v. Memphis Park Association* 7 Lea, 225, 229; *Saunders v. Stallings*, 5 Heisk., 65, 70-73; *Memphis Gaslight Co. v. The State*, 6 Cold., 310, 98 Am. Dec., 452. The relations of the parties have much to do with the matter also; likewise the use to which the property is put. The general rule is that everything attached to the freehold becomes land. *Childress v. Wright*, 2 Cold., 350. This rule is relaxed, as between landlord and tenant, in favor of the latter (*Saunders v. Stallings*, supra), and as to machinery introduced for manufacturing purposes (*Memphis, etc., Co. v. The State*, supra), also between the tenant for life and the remainderman (*Cannon v. Hare*, 1 Tenn. Ch., 22); but is administered strictly between the owner of the land and a trespasser making erections thereon

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(*Malone v. The State*, 11 Lea, 701; *Childress v. Wright*, supra), and, between vendor and vendee, in favor of the latter. *Degraffenreid v. Scruggs*, 4 Humph., 451, 40 Am. Dec., 658.

In the case last cited, it appeared that one Shelton was the owner of a cotton farm, on which he erected a cotton gin for the purpose of ginning cotton produced thereon; that the house was built upon blocks, and the gin fastened to the house by nails and braces. Shelton thereafter conveyed the land by deed in trust to Nelson to secure the payment of certain debts. Subsequent to the making of this deed in trust, Shelton executed a deed in trust to one Scruggs, for the benefit of other creditors, on the cotton gin alone. Thereafter Nelson enforced his trust deed by a sale of the property therein conveyed, the land, and Degraffenreid became the purchaser. Scruggs, the trustee under the second deed in trust, demanded the cotton gin from Degraffenreid but the latter refused to surrender it. Thereupon Scruggs brought suit. The court below charged the jury that, if the gin could be severed and removed without serious injury to the land or gin, it would not pass under the deed, and they must find for the plaintiff. The jury so found, and upon appeal to this court, after stating the strict rule of the common law as above announced, and its relaxation in favor of tenants, and in relation to fixtures erected for purposes of trade, and its rigid maintenance as between executor and heir, and between vendor and

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vendee, the court proceeded to decide the controversy in favor of the vendee, in the following language:

"In this case the gin was erected in the ginhouse, and fastened to the house by nails and braces. It was, therefore, permanently attached and fixed to the freehold, and this is the true and certain criterion to determine whether it passed by the deed with the freehold. . . . Any attempt to carry out the principles stated by his honor to the jury would be attended with endless difficulty and uncertainty. If fixtures attached to the freehold may be removed provided they can be severed without any injury to the land, scarcely a case could occur in which they would pass by the deed."

As said by Cooper, J., in *Cannon v. Hare*, supra: "The finest framed or other buildings . . . are constructed upon foundation walls, and any building can be taken down to the top of the foundation walls, and to the bottom rock of the foundation walls, without injury to the soil. Accordingly, the tendency of modern decisions is to make the rights of the parties to fixtures and buildings depend, not on the manner in which they are attached to the freehold, but upon the character of the parties, the intention in erecting the improvements, and the uses to which they are put.

"Loose machinery in a manufacturing establishment will, as we shall see presently, go to the heir as against the executor, while the same machinery firmly attached to the building, and even the building itself, belong to the tenant for years, as between him and the landlord.

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So, substantial houses built upon stone foundations with brick chimneys, and indubitably attached to the soil, will, if erected principally for purposes of trade, belong to the outgoing tenant for years; while the same buildings, or even buildings resting upon pillars or trestles, and not let into the soil, if erected and used as dwellings, or for the more convenient enjoyment of the land, or for the purpose of obtaining an income by renting, would go, with the freehold, to the landlord, even as against a tenant for years."

So, in *Cubbins v. Ayres*, 4 Lea, 329, it was held, in favor of a tenant as against his landlord, that a barroom counter and shelving, and an office counter, and an iron safe, erected on the premises of the landlord by the tenant, should be treated as personal property, under the theory of trade fixtures, although the counter was nailed to the wall and the floor, and the shelving was behind the counter, and was fastened by nails also to the walls and the floor, and the iron safe was well set into an aperture in the wall larger than the safe itself, and surrounded with a structure of wood, fitted and securely fastened to the sides and top of the wall around the opening, and inclosed therein. On the other hand, in *Johnson v. Willinghamby*, 3 Tenn. Cas., 338, it was held that a dwelling house, kitchen, stable, corncrib, and other outhouses erected upon land by a tenant, without any contract with the landlord in respect thereto, became the property of the owner of the land at the expiration of the tenancy, on the ground that the erection was

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made with a view of permanent advantage to the land, and not for the purpose of trade or manufacture. And in *Johnson v. Patterson*, 13 Lea, 626, machinery in a cotton factory was held to be realty, under the following circumstances: When President Andrew Johnson died, he had a debt on one Prather, due by note, for the sum of \$10,000. This debt was secured by deed in trust to Thomas Maloney, conveying a brick cotton factory, with the two acres of land on which it stood, with all the machinery and fixtures of all kinds in the cotton factory, consisting of spinning frames and attachments necessary to operate them, with all appurtenances connected with or belonging to the factory, with power to sell on default, as is usual in such cases. On default occurring, the trustee advertised and sold the property, and it was bought in by the three children of President Johnson, viz., Andrew, Jr., Mrs. Patterson, and Mrs. Stover, for the debt due on the trust deed. The trustee conveyed the property to these purchasers by deed, and they went into possession. The point was made that much of the property was strictly personal property, and did not come within the definition of real estate. Speaking to this subject, the court said: "As to the point suggested in the bill, that much of the property was strictly personalty and not realty, alluding, as we learn from argument of counsel, to the machinery making up a part of the cotton factory conveyed, we need say but little. "The complainant" (the widow of Andrew Johnson, Jr., who had died in the meantime)

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"stands in the shoes of her deceased husband in asserting the position that the machinery making part of the cotton factory is personalty. It is beyond question that he and the copurchasers purchased the whole property as one property, and treated it as such. The intent was to either use it permanently as such, and as a whole, or to sell it as a whole. Most certainly the parties did not intend to become owners as tenants in common of the brick house erected for the purpose of the enterprise, and to hold the machinery as personalty, with the right to divide it among them as such. It would probably, if not certainly, have been impossible for them so to divide it without rendering it useless for all practical purposes. Modern authorities all agree that the most controlling test of the question whether property connected with real estate is to be deemed realty or a mere chattel, removable at the pleasure of the owner, is the intention and purpose of the erection. . . . But the intent and the nature of the property, taken as a whole, as the parties purchased it and treated it, concurred in making it a part of the freehold, and stamped it as realty, and it must so be held."

When the facts contained in the statement are viewed in the light of the foregoing decisions, we think it cannot be doubted that the purpose of the ice company in placing the machinery in the building was to permanently enhance the value of the property and to make it a part of the realty. It is equally clear that this purpose was concurred in by the seller of the ma-

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chinery, subject only to the condition that such seller should have a right to withdraw it in case the purchase money notes should not be paid.

The question to be determined is whether this secret condition, known only to the seller and buyer, should be held operative against an innocent purchaser of the realty.

We think this question should be decided in the negative, for two reasons. The first of these reasons is based upon the principle that, where one of two innocent persons must suffer, that one should bear the loss whose conduct or act placed it in the power of a third party to impose upon or deceive another. The second reason is to be found in the policy of our law in respect of real estate titles. That policy is opposed to secret liens, and requires that the public records shall contain evidence of all liens and incumbrances. An opposite view would soon involve titles to realty in great confusion, and result in needless depreciation of land values, since a vendee would search the records in vain for a secret agreement between the vendor and some prior owner in respect of the fencing or houses, or mills containing machinery, or other erection upon the land. The purchaser desiring to buy land would justly suffer under the apprehension of some such secret understanding between prior parties, whereby, after paying for the land, he might be deprived, without his consent and without compensation, of a considerable portion of the value of the property that he supposed he was buying.

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Now, in the present case, it appears that the machinery was so placed in the factory as to be *prima facie* a part of the realty itself, and the whole erection, composed of the building and the machinery, was in the possession of the owner of the land. The trustee and bondholders under the two mortgages or trust deeds were justified from the appearance of things in assuming that the machinery was in truth a part of the land, and in taking such machinery into estimation in determining the amount of money which they would advance upon the entire property. Now to deprive them of this security in behalf of the seller of the machinery, who retained the title merely as security, and by a secret or unrecorded writing between such vendor and the purchaser of the machinery, would be, in our judgment, to sacrifice the substance of justice to its mere form.

This question has received consideration in other jurisdictions, and the decided weight of authority is in favor of the view here taken. The cases are collected in a note on pages 628 and 629, 13 Am. & Eng. Encyc. of Law (2d Ed.).

We shall refer specially to a few of the cases cited.

In *Southbridge Savings Bank v. Exeter Works*, 127 Mass., 542, it appeared that the defendant delivered to one Stevens, to be used on trial at his machine shop in Brookfield, an Exeter sectional boiler, which, by agreement between them, was to remain the personal property of the defendant until paid for. Thereafter Stevens made a mortgage to the plaintiff of the machine

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shop and land, under which the property was sold; and the plaintiff claimed under that sale. At the time the mortgage was executed, the machinery had been placed in the building, which was a machine shop, by Stevens, the mortgagor, for the purpose of furnishing the motive power for his machinery. It was firmly attached to the land, was in connection with the steam engine, shafting, and machinery adapted to the machine shop and business, and was essential to the equipment and use of the building for the purpose for which it was intended. It was therefore *prima facie* a part of the land. In speaking to this subject, and the rights of an innocent purchaser under such state of facts, the court said:

"Where, as in this case, personal property is sold for the purpose of being annexed to the realty, and it is so annexed, an agreement between the seller and the buyer that it shall not become a part of the realty, but shall remain the personal property of the seller, will not bind or affect a vendee or mortgagee without notice. Notwithstanding such agreement, the property will pass to such vendee or mortgagee as a part of the realty." To the same effect, see *Hunt v. Bay State Iron Co.*, 97 Mass., 279; *Thompson v. Vinton*, 121 Mass., 139; *Prince v. Case*, 10 Conn., 375, 27 Am. Dec., 675; *Landon v. Platt*, 34 Conn., 517; *Powers v. Dennison*, 30 Vt., 752; *Davenport v. Shants*, 43 Vt., 546; *Tibbetts v. Horne*, 65 N. H., 242, 23 Atl., 145, 15 L. R. A., 56, 23 Am. St. Rep., 31; *Bringholff v. Munzenmaier*, 20 Iowa, 513, 518, 519; *Stillman v. Flenniken*, 58 Iowa, 450, 454, 10 N. W., 842,

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43 Am. Rep., 120; *Rowand v. Anderson*, 33 Kan., 264, 6 Pac., 255, 52 Am. Rep., 529; *Climer v. Wallace*, 28 Mo., 556, 75 Am. Dec., 135.

In *Prince v. Case*, *supra*, the reason for the rule is thus stated:

"The policy of our law is that titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were this new mode of conveyance to prevail, incumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides, and, when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those unaided who had ventured to rely upon the word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who neglected the means the law put into his power should suffer, rather than he who has used those means." This case is cited, with approval of the reasoning just set forth, in the cases of *Powers v. Dennison*, *supra*, *Tibbetts v. Horne*, *supra*, and *Rowand v. Anderson*, *supra*.

There are some cases which hold that the rights of the conditional seller are superior even to the rights of a purchaser or mortgagee without notice. We have exam-

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ined these authorities, but do think they rest upon a sound basis. We are of opinion that the rule which we have announced is the sound view of the matter, and is supported by reason and the weight of authority.

There are cases both ways upon the question whether the rights of such conditional seller would be superior to those of the holder of a mortgage in existence at the time the property was annexed to the land. It is unnecessary to go into this question in the present case, and we express no opinion upon it. Nor are we to be understood as impeaching the validity of conditional sales of personalty in general, or as impairing their efficiency, as previously understood in this State, when the property which is the subject of such sales remains in its original form, not transmuted into realty in such guise, or under such circumstances, as are of character likely to deceive innocent purchasers or mortgagees of the latter class of property.

It results from the views above expressed that we are of opinion the decree of the chancellor and of the court of chancery appeals, in favor of the mortgagees, must be affirmed.

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**MRS. ALMA T. THACH v. CONTINENTAL TRAVELERS'
MUTUAL ACCIDENT ASSOCIATION.**

(*Nashville.* December Term, 1904.)

- 1. COURT OF CHANCERY APPEALS.** Finding of facts is conclusive on supreme court, when.

The finding of facts by the court of chancery appeals, where there is evidence to sustain it, is not subject to review in the supreme court. (*Post*, p. 276.)

- 2. FOREIGN CORPORATIONS.** Process cannot be served on resident attorney acting in that capacity alone.

Jurisdiction of a nonresident corporation cannot be obtained by service of process on a resident attorney who has been retained simply in that capacity; especially where it had never established any agency or place of business in this State, nor had any agents here. (*Post*, pp. 278-285.)

Code cited and construed: Secs. 4543-4546 (S.).

Acts cited and construed: 1887, ch. 226.

Cases cited, approved, and distinguished: *Insurance Co. v. Spratley*, 99 Tenn., 332, 172 U. S., 603; *State v. Insurance Co.*, 106 Tenn., 287; *Pope v. Manufacturing Co.*, 87 N. Y., 137; *Harshey v. Blackmarr*, 89 Am. Dec., 520.

- 3. PLEA IN ABATEMENT.** To jurisdiction is not waived by answer to the merits, when.

An answer to the merits, after a plea in abatement to the jurisdiction has been overruled, will not confer jurisdiction, and will not deprive the defendant of his right to rely, in the supreme court, upon the overruled plea in abatement. (*Post*, pp. 285-287.)

Acts cited and construed: 1897, ch. 121.

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4. **SAME.** Pleas in abatement and in bar may be filed simultaneously, or plea in abatement may be filed independently, and if overruled, then a plea in bar may be filed.

Pleas in abatement and pleas in bar are not required to be filed simultaneously, but may be so filed; or a plea in abatement may be filed independently, and if it is overruled, a plea in bar may then be filed. (*Post*, pp. 287, 288.)

Acts cited and construed: 1897, ch. 121.

Cases cited and approved: *Railroad v. McCollum*, 105 Tenn., 624; *Sewell v. Tuthill*, 4 Cates, 271.

FROM FRANKLIN.

Writ of error from the Chancery Court of Franklin County.—T. M. McCONNELL, Chancellor.

W. T. SANDERS, H. C. THACH, and LYNCH & LYNCH,
for complainant.

O. W. ANDERTON and ESTILL & LITTLETON, for defendant.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The object of this bill is to recover from the defendant association \$2,000, with interest, on an accident policy issued by defendant to Dr. Stephen D. Thach, the husband of complainant. The indemnity provided by

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the policy was against death as a result of a "physical bodily injury, through external, violent and accidental means." The policy was issued on the 18th of June, 1898, and Dr. Thach died in Franklin county, Tennessee, October 1, 1900.

It is alleged in the bill that notice of the injury and death of the insured, accompanied by the proper proofs thereof, was given to the defendant in accordance with the provisions of the policy. It was also alleged that the defendant had been doing business in this State, soliciting and issuing insurance policies, but, so far as known to complainant, it has no resident agent in this State, except an attorney at law, O. W. Anderton, who is its attorney and agent at Winchester, Tennessee. Process was served upon said attorney, as agent of the defendant association, and a copy of the same, together with a copy of the bill, was mailed to its home office, as prescribed by the statute. On the 10th of June, 1901, defendant, by counsel, interposed, a plea in abatement to the jurisdiction of the court; stating therein that it entered its appearance for this purpose.

It is averred in the plea that defendant is a corporation of the State of Indiana, and organized as such under the laws of that State; that it is a mutual company, and has no capital stock; that its office and principal place of business are in the city of Indianapolis, Indiana; that it has no other office or place of business; that it has not now and never had an office or agency

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in Tennessee, or any other State outside of the State of Indiana, and when this suit was instituted, and process issued thereon, and its alleged service was made, it had no office or agency in Tennessee; and that no person or persons were authorized to represent it as agent in said State. It is further averred in the plea that at no time did Mr. Anderton, the attorney upon whom the process was served in this case, have authority as agent to act for it, and that when this suit was brought, and the process was served upon him, he was not its agent, attorney, or representative in any capacity, and that he is not now its agent or attorney in any matter or thing. It is further averred in the plea that no subpoena or notice of the filing or pendency of this action has ever been served upon it or its president, or upon any one authorized to accept service for it, and that it is not now and never has been engaged in transacting or doing business as an insurance company in the State of Tennessee. This plea is verified in the manner prescribed by law, and complainant joined issue on it.

It appears that on the nineteenth of June, 1903, the chancellor overruled the plea in abatement, adjudging that Mr. Anderton was, in the sense of the statute, an agent of the defendant association, and that service of process upon him was sufficient, and gave the court jurisdiction of the case. The company thereupon asked leave and was granted thirty days in which to file an answer, but, as a matter of fact, its answer was not filed until May 23, 1904. It is presumed that a further ex-

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tension of time to file the answer was granted by the court or extended by the courtesy of counsel.

The company, in its answer, admits that Dr. Thach had a policy in said association at the time of his death, and admits that he came to his death about the time stated in the bill, but denies that his death was the result of accidental means. The following clause in the policy is then set out as follows:

"This certificate of insurance does not cover injuries nor death of which there is no visible mark upon the body of the insured, nor does it cover acts committed by the insured while under mental aberration, nor shall it cover suicide, whether the person is sane or insane; nor shall it cover accidental injury received while following any occupation other than that named by the insured in his application for insurance, except as provided in paragraph 2 hereof."

It is then averred in the answer that Dr. Thach came to his death by his own hand, having committed suicide on or about October 1, 1900, and that thereby the company is exonerated from all liability under said policy.

Proof was taken, and on the final hearing the chancellor adjudged liability against the company for the full amount of the policy, with interest thereon; making, in all, a recovery of \$2,428.33.

The court of chancery appeals affirmed the decree of the chancellor. The cause is now before this court on writ of error sued out by the defendant company.

Two errors have been assigned:

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(1) The court erred in finding the issues tendered by the plea in abatement in favor of complainant and against the defendant.

It is insisted that, upon the facts found and reported by the court of chancery appeals, that court should have held that the insurance company was not subject to the jurisdiction of the courts of Tennessee, and the plea in abatement should have been sustained.

(2) The court of chancery appeals erred in finding that Dr. Thach came to his death from an accidental discharge of his pistol in his left hand, and that he had not committed suicide.

It is obvious that this last assignment of error raises purely a question of fact, and, there being evidence to sustain it, that finding is not subject to review in this court.

The only question left open upon the record is whether or not the court of chancery appeals erred in overruling the plea in abatement.

The facts found by the court of chancery appeals on the issues raised by the plea in abatement are as follows:

Defendant association is a corporation of Indiana, having its home office and principal place of business in the city of Indianapolis, in that State. It does not appear to have had any regular or established agency or agents or place of business in this State, nor did it have any subordinate lodges, bodies, etc., in this State. On being notified of the death of Dr. Thach on the first of

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October, 1902, the secretary of defendant association shortly thereafter appeared in Winchester, Tennessee, and employed Mr. O. W. Anderton, an attorney at law, to defend it in the event suit was brought to recover on the policy. Shortly after this a bill was filed in the chancery court of Franklin county against defendant association to recover \$5,000, the face value of the policy. The court of chancery appeals infers that process in that case was served on Mr. Anderton. Mr. Anderton associated with him Hon. Jesse M. Littleton in the defense of that suit. These gentlemen filed a petition on behalf of the company, and had their cause removed to the federal court at Nashville. Counsel for the complainant below notified counsel for the defendant association that they intended to dismiss the case in the federal court, and sue in the State court for \$2,000. Mr. Anderton notified the defendant company of this information. The defendant company thereupon wrote him, when the case was dismissed in the federal court, to wire his resignation as its attorney, and this he did as soon as he heard of the dismissal of the suit in the federal court, and his resignation was accepted.

Mr. Anderton states in his deposition that he does not know whether or not it was the object of the defendant, in having him wire his resignation as its attorney, to defeat jurisdiction of the suit in said court, but says this was suggested between him and his associate counsel. He said he never heard of Littleton resigning when he did, but that he had employed him. He is not cer-

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tain whether he wired his resignation before the bill in this case was filed in the State court, or between the time it was filed and the process was served upon him. All he remembers about it is that his telegram resigning was sent on Sunday. He states that, under his original employment, he looked up evidence and investigated the case before any suit was brought. He was asked when he was employed as an attorney, and by whom, and replied, "Mr. Littleton told me he wanted me to help him in the case shortly after process was had." He further states that he had no further communication with the defendant since his resignation, that he remembers, but he believes Mr. Littleton wrote a letter or two to the company, and that he signed his name along with his to the letter. He further states that the secretary of the defendant association had employed him as a lawyer, and in no other capacity. He further stated in his deposition that Mr. Littleton represented him in all the cases brought, and that both he and Littleton are now representing defendant in this case.

The process in the present case, as already stated, was served upon Mr. Anderton. The court of chancery appeals held that, under our statute and decisions, the service upon Anderton was sufficient. The Acts of 1887, page 386, chapter 226, embodied in Shannon's Code, secs. 4543-4546, provides in the first section of the act:

"That any corporation claiming existence under the law of any other State, found doing business in this State, shall be subject to suit there to the same extent

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that corporations of this State are, by the laws thereof, liable to the same, so far as relates to any transaction had in whole or in part within this State, or in case of action arising here, but not otherwise."

The second section of the act provides:

"Any corporation having any transaction with persons, or having any transactions concerning any property situated in this State through any agency acting for it within this State, shall be held to be doing business within the meaning of section 1 of this act."

Section 3 of the act provides:

"Process may be served upon any agent of said corporation that is within the county where the suit is brought, no matter what character of agent such person may be, and in the absence of such agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arising took place," etc.

The constitutionality of these acts was challenged in *Life Ins. Co. v. Spratley*, 99 Tenn., 332, 42 S. W., 145, as violative of articles 5 and 14 of the amendment to the constitution of the United States, and of section 17, article 1, of the bill of rights to the constitution of this State. Its constitutionality, however, was upheld by this court, and its decree affirmed on the writ of error by the supreme court of the United States, reported in 172 U. S., 603, 19 Sup. Ct., 308, 43 L. Ed. 569. The facts of that case, briefly stated, are:

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That the insurance company was a foreign corporation organized under the laws of the State of Connecticut to carry on a life insurance business, and had its home office in the city of Hartford. For many years prior to the year 1894 it actively prosecuted its work in the State of Tennessee; soliciting applications for life insurance, and issuing policies upon such applications as were approved by its officers. In the year 1889 and afterwards, in the year 1893 an agent of this company was in the State of Tennessee, and, by his solicitations, induced one B. R. Spratley, a citizen of this State, to apply for insurance on his own life; and upon these applications the complainant company issued two policies, which were both delivered in this State. In the year 1896 B. R. Spratley died, and proof of his death was forwarded to the company. Very soon thereafter complainant sent O. N. Chaffee, one of its employees, into the State to investigate this claim, and the condition under which this death occurred. He came, and had interviews with the beneficiary, Mrs. Spratley, her brothers, and other parties, all of which he reported to his home company. Chaffee visited Mrs. Spratley, and submitted an offer to settle on the terms communicated to him by his company, but this offer was declined. While in this State on the business and occasion referred to, suit was instituted by the beneficiary against the insurance company for the amount alleged to be due on these policies, in the circuit court of Shelby county, and process was served on Chaffee as agent of the com-

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pany. Notice was then given the company of the bringing and pendency of the suit in compliance with chapter 226, page 386, of the Acts of 1887.

It will be observed from the report of this case that at the time the death occurred the company was not transacting business in the State of Tennessee, and had no resident agent here. It further appears that Chaffee, its agent, was sent into this State only for the purpose of investigating this claim, and the conditions under which the death occurred. While here on that business he was served with process, and this court held that the service was authorized by the acts already cited, embodied in sections 4543-4546, Shannon's Code. It will be observed that section 3 of that act provides that "process may be served upon any agent of said corporation that is within the county where the suit is brought, no matter what character of agent such person may be," etc.

This court cited with approval *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y., 137, in which the following language was approved:

"The object of all service of process for the commencement of a suit or any other legal proceeding is to give notice to the party proceeded against, and any service which virtually accomplishes that and answers the requirements of natural justice and fundamental law. What service shall be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject

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only to the limitation that the service must be such as may be reasonably expected to give the notice aimed at."

The court of chancery appeals further finds that defendant association desired to avoid the jurisdiction of the State court, while complainant desired to invoke that jurisdiction. That court, however, finds as a fact that Mr. Anderton was an agent of the insurance company, within the meaning of the third section of Acts 1887, page 387, chapter 226.

It is insisted on behalf of defendant association that, upon the facts found, the court of chancery appeals should have held that the insurance company was not subject to the jurisdiction of the courts of Tennessee, and the plea in abatement should have been sustained. It is insisted that, to obtain jurisdiction of a foreign corporation in the courts of this State, such corporation must be doing business in the State, through some agency acting for it within the State. Prior to the act of 1887, foreign corporations could only be sued in the courts of the State where they had a local office and resident agent. By the terms of the second section of the act of 1887, the business done in the State that subjects the corporation to the jurisdiction of the court must have been done through some agency acting for the corporation within the State. It is insisted that, under the findings of the court of chancery appeals, the defendant is an Indiana corporation, and had no office or agency of any character in this State, and that all the business it ever did in this State was to retain an attor-

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ney to look after this suit in Franklin county, if one should be brought.

The opinion of the supreme court of the United States in *Insurance Co. v. Spratley*, reported in 172 U. S., 602, 19 Sup. Ct., 308, 43 L. Ed., 569, is invoked, wherein that court said as follows:

"The agent had not, so far as the case shows, received any express authority from the company to receive service of process.

"The court does not hold, nor is it intimated, that none but an agent who has authority to make contracts of insurance in favor of the company could be held to represent it for the purpose of the service of process. It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of the agent employed."

It is therefore insisted that Anderton was only employed to represent the company in the event a suit should be brought, and that it cannot therefrom be reasonably and fairly implied, from the kind and character of an agent that Anderton was, that he had power to receive service of process.

We are of opinion that this contention is well made, and that Anderton was not the kind and character of agent upon whom process could be served to give the court jurisdiction of the defendant association. The only fact found by the court of chancery appeals to establish the agency of Anderton is that he was employed in the capacity of an attorney to defend any litigation

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against it that might grow out of the death of Dr. Thach. The employment was by the secretary of the association, who visited Tennessee for the purpose of making an investigation of the conditions of the death, and on his return to Indianapolis he sent a check for the sum of \$20 to Mr. Anderton as a retainer fee. It is clear from the findings of the court of chancery appeals that Mr. Anderton had no connection whatever with this association, except as an attorney. It is true that under his employment he looked up evidence and investigated the case before any suit was brought; that he talked to Dr. Murrell about the case, and procured his statement. But all this was done in the capacity of an attorney. It further appears that the only business transacted by the defendant association in the State of Tennessee was to issue to the assured a policy, without the instrumentality of either a local or traveling agent.

In the case of *State v. Insurance Co.*, 106 Tenn., 287, 61 S. W., 75, this court, through Judge Wilkes, in differentiating the case of *Conn. Mutual Ins. Co. v. Spratley*, supra, from the case then on hand, said of the *Spratley* case (1) that the company had done business and had the transaction out of which the suit arose in Tennessee; (2) that Chaffee, as agent, had come into Tennessee in a representative capacity; (3) that he had come with respect to the original Tennessee transaction; (4) that undeniably an agent of the company was in Tennessee, and in a representative capacity, and consequently the sole question was whether, under such circumstances,

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process could be served on the agent so as to bind the company. It was held, under the peculiar statute, that it could.

In the present case it does not appear that the original transaction, viz., the issuance of the policy, had taken place in the State of Tennessee; nor was Mr. Anderton acting in the capacity of an agent, but simply as an attorney to defend the litigation in the event a suit might be brought.

Now, we think, upon the facts found by the court of chancery appeals, that the jurisdiction of a nonresident corporation may not be obtained by service of process on a resident attorney who has been retained simply in that capacity.

It was held in *Harshey v. Blackmarr*, 89 Am. Dec., 520, that "an attorney at law cannot, without special authority, admit service of jurisdictional process upon his clients." Nor, we may add, is an attorney the kind or character of agent contemplated by the act of 1887, upon whom process could be served. It is said, however, that the answer filed by the defendant after the overruling of the plea in abatement gave the court jurisdiction. It is insisted that by answering the bill the insurance company was deprived of its right to assign as error the action of the chancellor in overruling the plea in abatement.

It appears the original bill was filed on the tenth day of May, 1901, and the plea in abatement was filed on the tenth day of June, 1901. The cause was heard on the

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plea in abatement on the seventeenth day of June, 1903, when the same was overruled. Defendant did not except to the action of the court in overruling the plea in abatement, but in the decree it was recited that, upon motion of the defendant's counsel, defendant is allowed thirty days in which to answer complainant's bill. The cause was heard by the chancellor on the proof July 25, 1904, and a decree pronounced in favor of complainants. No appeal was prayed, but the cause was brought to this court upon a writ of error. It is now insisted that this court cannot look to the question raised by the plea in abatement, for two reasons: (1) Because the answer to the merits waived the plea in abatement. This cannot be true, since Acts 1897, p. 277, c. 121, which provided (section 1) that a defendant has the right, upon the overruling of a plea in abatement for any cause, filed by him to any action, to plead to the merits, and rely upon any defenses as if said plea had not been interposed.

Section 2 provided that a defendant can in any suit plead both in abatement and in bar at the same time, and said plea in bar is no waiver of the plea in abatement, and, when so pleaded, both pleas shall be heard at the same time, and judgment rendered on each plea.

It is insisted that section 1 does not give the defendant the right to plead to the merits, and still rely upon a plea in abatement that has been overruled; and this for the reason that said section expressly provides that, after the overruling of a plea in abatement, the defend-

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ant may plead to the merits as if said plea had not been interposed. In other words, after the overruling of a plea in abatement, the defendant has the election to either stand on his plea, or plead to the merits; that is to abandon his plea in abatement, and treat it as if it had never been interposed. Moreover, it is insisted on behalf of the defendant in error that the act of 1897 is mandatory, and both pleas should be filed simultaneously.

In *Railroad v. McCollum*, 105 Tenn., 624, 59 S. W., 136, this court, in construing this act, said:

"It will be noticed that in the first section defendant was given the right, upon the overruling of a plea in abatement, to plead to the merits, and rely upon any defenses, as if said plea had not been interposed. The second section is not so broad in its terms, but, we think, must have the same construction. . . . The spirit and intent of the act seems to be to do away with the former necessity of standing by pleas in abatement, and succeeding or failing upon that defense alone in a single issue, and to give the parties the right to do all their pleading at the same time, if they wished."

The title of this act also indicates that it was not the purpose of the legislature to require the filing of the plea in bar and the dilatory plea at the same time, for the caption is, "An act to permit a defendant to plead to the merits in any suit where a plea in abatement has been overruled and to permit a plea in bar to be filed at the same time of the filing of the plea in abatement and to provide how the issues are to be tried."

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It is obvious that, under the second section of this act, the two pleas may be interposed simultaneously, if the pleader so desires; but under the first section he may interpose his plea in abatement independently, and, if that is overruled, he may then file his plea in bar.

While the precise point we are now considering was not presented in *Sewell v. Tuthill*, 4 Cates, 271, 79 S. W., 376, decided by this court at its December term, 1903, it was held that, upon judgment being rendered against a plea in abatement, either upon motion to strike out, or upon being set down for argument upon its sufficiency, or upon demurrer, or upon an issue as to its merits, the defendant has the right to plead over. This case also involved a construction of the act of 1897, the insistence being made by the appellants that defendant had the right to plead over only when a plea in abatement had been stricken out as frivolous or overruled on demurrer, or when it was held insufficient; but this court overruled that contention, and held that, when a plea in abatement was overruled upon an issue as to its merits, the defendant still had the right to plead over. We are entirely satisfied with this construction of the statute, and adhere to it. It results that, in our opinion, Anderton was not an agent of defendant company upon whom process might be served under the act of 1887, and that the plea in abatement was properly filed, and should have been sustained. The decrees of the chancellor and the court of chancery appeals are reversed, and complainant's bill is dismissed, with costs.

In re Wooten's Estate.

IN RE WOOTEN'S ESTATE.

[(*Nashville*. December Term, 1904.)]

1. **ADMINISTRATORS.** Jurisdiction of circuit court is appellate and revisory only as to their appointment.

The jurisdiction of the circuit court over matters pertaining to the appointment of administrators is appellate and revisory only, and it is without authority to grant letters of administration, but the proper practice is for that court, upon determination of the appeal, to remand the cause for the issuance of letters, and not to hear new applications for the appointment of an administrator after declaring that none of the applicants in the county court was entitled to the administration. (*Post*, pp. 297-300.)

Code cited and construed: Secs. 3934, 3940 (S.); secs. 3042, 3048 (M. & V.); secs. 2202, 2207 (T. & S. and 1858).

Case cited and approved: *Wilson v. Frazier*, 2 Hum., 31.

2. **SAME.** Jurisdiction to revoke or cancel letters of administration is in the county court.

The county court is the proper and only tribunal having original jurisdiction to revoke or cancel letters of administration improvidently or improperly granted by it. (*Post*, p. 299.)

3. **SAME.** Right of next of kin to nominate an administrator.

The next of kin with the prior right to administer, not desiring to do so personally, has the right to nominate another in his stead who should be appointed, if he is a fit and suitable person tested by the same rules as if the next of kin were applying in person. (*Post*, pp. 306-311.)

Cases cited and approved: *Feltz v. Clark*, 4 Hum., 79-83; *Phillips v. Green*, 4 Heis., 350; *Varnell v. Loague*, 9 Lea, 161.

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4. **SAME.** Same. Right of next of kin to nominate another after court's refusal to appoint first nominee.

The county court, on denying the application by the next of kin for the appointment of his nominee as administrator, has no right of its own motion to appoint another as administrator, without giving the next of kin, and after him the creditors, an opportunity to present one of their number, or to nominate another person for the appointment. (*Post*, pp. 311, 312.)

5. **SAME.** Attorney representing bulk of estate, but obligated to carry into effect certain agreements requiring the sanction of the chancery court is ineligible.

The attorney representing the bulk of the estate, but at the same time obligated as such attorney to carry into effect certain agreements which divert large amounts of the funds of the estate into channels different from the ordinary channels of distribution, is not eligible for appointment as administrator, especially where the sanction of the chancery court for carrying such an agreement into effect is required. (*Post*, pp. 301-306, 312.)

6. **SAME.** Same. Right of next of kin to make second nomination is not waived by his appeal and decision against first nominee.

The next of kin, by appealing from an order of the county court refusing to appoint his nominee for administrator and appointing another of its own motion, does not waive his right to make a second nomination, if the first nominee was held to be ineligible by the revising court. (*Post*, pp. 314, 315.)

7. **SAME.** Court to decide between next of kin of same degree applying for administration.

The statute providing that where there is more than one next of kin, the court may decide which of them shall be entitled to administration, applies only where there is more than one next of kin of the same degree applying for administration. (*Post*, pp. 315, 316.)

Code cited and construed: Sec. 3339 (S.); sec. 3047 (M. & V.); sec. 2206a (T. & S.).

In re Wooten's Estate.

FROM DAVIDSON

Appeal from the Circuit Court of Davidson County.—
LYTTON TAYLOR, Special Judge.

VERTREES & VERTREES, C. C. TRABUE and BOYD &
M'NEILLY, for Frizzell.

ALLEN & RAINES, for John T. Allen.

JOHN A. PITTS, W. D. WITHERSPOON and JOHN R.
AUST, for Baxter Smith.

JOSEPH W. BYRNS, HARRY S. STOKES and JOHN E.
TURNER, for Wooten Heirs.

MR. JUSTICE WILKES delivered the opinion of the
Court.

Mary J. Wooten died in Davidson county in January
1904, leaving a will, in which John R. Sneed was named
as executor.

The greater part of her estate was given to her sis-
ter, Mrs. Martha E. Hudson, a resident of California.
It consisted of about \$100,000 of personalty and some
\$25,000 of realty.

The property given to Mrs. Hudson was limited to a

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life estate, with remainder to her children. The rents of a storehouse in Nashville were given to W. H. Atwell for life, with remainder to Mrs. Hudson; and some minor bequests were made.

She left no children, and her next of kin were her sister, Mrs. Hudson, and nephews and nieces, and their descendants.

Lewis Green and others, being nephews and nieces, instituted a contest of the will. It was supported zealously by the executor and the beneficiaries under it, and a heated and protracted litigation resulted.

In the contest, Mrs. Hudson, up to the time of the trial, stood with the executor for the maintenance of the will; but on the day before the trial she entered into a compromise with the contestants, in which she assented that the will might be set aside on the ground of insanity of the testatrix, and because it was procured by fraud and undue influence; and, as part of the compromise, it was also agreed that she should receive one-third of the estate, instead of one-fourth, to which she would have been entitled as sister. She was also to have certain furniture and jewelry, and all her interest was to vest in her absolutely, instead of for life, as limited by the will.

The executor was represented by quite an array of counsel, among whom was Col. Baxter Smith.

The majority of the contestants were represented by Allen & Raines, and the other interest by Stokes & Byrns, while Mrs. Hudson was represented by Messrs. Turney & Ashcraft.

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In the agreement of compromise it was stipulated that Mrs. Hudson's attorneys should be paid out of the estate \$5,000 for their services, and that the attorney's fees and expenses of Sneed, executor, should be paid out of the general estate. It was also agreed that Judge Allen was to be made administrator of the estate so soon as the will was set aside, and that he would proceed to wind up the estate as soon as possible, and, if necessary, file a bill in chancery for that purpose.

In this agreement Mr. Atwell was ignored, and this prevented the acquiescence of Sneed, executor.

With matters in this status, the contest was heard, and the will was set aside.

It does not appear that this was done because of the agreement, but upon a regular trial, in which Mrs. Hudson testified in behalf of the contestants.

Thirty days were allowed for a motion for a new trial. Within the thirty days, Sneed, the executor, died; and soon thereafter a petition was filed in the county court by the contesting parties, represented by Allen & Raines and concurred in by Mrs. Hudson, asking that Judge Allen be appointed administrator upon the estate; and in this petition the agreement entered into was referred to, and it was stated that Atwell had been promised the same share in the estate that he would have received under the will.

Atwell and the attorneys of Sneed opposed this application upon the ground that Allen had represented certain interests in the estate as attorney, that his interest

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was to defeat the will, and that the contest over the will was not yet decided, but was pending upon the motion for a new trial; and they asked that an administrator *de bonis non* be appointed, with the will annexed.

To this Green and others filed an answer asking that an administrator *pendente lite* be appointed to hold the funds until the will contest should be settled, and renewed the request that Judge Allen be appointed.

On the same day the county judge appointed Charles F. Frizzell, a business man of Nashville, as such administrator *pendente lite*, requiring of him a bond for \$200,000. Mr. Frizzell had not been an applicant for the office, was not interested in the estate as a beneficiary or creditor, but was selected by the county judge, presumably, because he was disinterested, and a business man living in the city, and a suitable person to act, though he had no experience in the execution of such trusts.

After this was done, a compromise was entered into with Mr. Atwell, by which it was stipulated that he should have a net income of \$100 per month, and rental from two storehouses belonging to the estate, and that the estate would expend in improvements upon this property \$2,000.

This was in lieu of what Mr. Atwell was given by the will, and amounts, perhaps, to something more than the provision made by the will.

It was also agreed that Sneed and his attorneys should have \$20,000 out of the estate as compensation for their expenses and services.

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It further appeared that Messrs. Allen & Raines were to have one-third of the recovery made by them for their clients out of their clients' shares, and that Judge Allen was to have his compensation as administrator, in addition, out of the estate.

As a result of these agreements, the will contest was finally abandoned; and on September 24, 1904, Judge Allen filed a supplemental petition in the county court, setting up the settlement of the contest, and reconciliation of the conflicting interests, and stating that he had been selected by the next of kin to carry out the agreements as made and asking that he be appointed administrator.

This was opposed by the interests represented by Stokes & Byrns, but was acquiesced in by all other interested parties, or at least there was no opposition.

The county judge, on the hearing, decided that Judge Allen was not a proper party to administer, because not disinterested, and he thereupon appointed Mr. Frizzell, requiring a bond of \$200,000; and Green and other petitioners appealed to the circuit court.

In that court, on the day of hearing, the petition of Green was amended so as to pray that James Wooten, one of the nephews and one of the petitioners, be appointed, if Judge Allen could not be, or that he be associated with him in the administration.

Thomas Wooten, another nephew, represented by Stokes & Byrns, was allowed to file a petition asking for his own appointment in the event the court should re-

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move Frizzell and decide to appoint one of the next of kin.

These applications in the circuit court were excepted to by Mr. Frizzell.

On the trial the attorneys for Sneed and Atwell expressed a willingness for the appointment of Judge Allen.

The evidence was heard, and the court decided that neither Allen nor Frizzell had the right to administer; that James and Thomas Wooten were not fit and suitable persons to administer; that the next of kin who were fit and proper persons had the prior right to administer for six months after the death of Sneed and the termination of the will contest; and he thereupon fixed October 31, 1904, as a date to hear applications for the administration from fit and proper persons who were next of kin or creditors, and in default of such kin or creditors, then from other persons.

Upon this day, petitions for such appointment were filed by Col. Baxter Smith and Ben R. Webb; Mr. Smith claiming to be a creditor of the estate on account of fees owing him by the executor for services rendered in the will-contest suit.

The application of Col. Smith was approved by the attorneys for Sneed and Atwell, who claimed to be creditors, also, by virtue of fees owing them, as before stated.

The circuit judge thereupon appointed Col. Smith, and directed that his action be certified to the county

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court, and that court was directed to issue letters accordingly.

Frizzell, Allen, and the Wootens, who had applied, moved for a new trial, which was overruled.

The grounds of the motion for a new trial of Mr. Frizzell are, in substance, that the court was in error in holding that Mr. Frizzell was incompetent by reason of inexperience, since there was no proof justifying that conclusion, and because no issue at all had been made with respect to Mr. Frizzell's qualifications; and was in error in assuming the authority to appoint an administrator, inasmuch as such authority resided only in the county court; and was in error in holding that Baxter Smith, Esq., was a creditor of Mary J. Wooten, deceased and in assuming to appoint him administrator.

Much testimony as to the fitness to Mr. Frizzell was taken on the motion for a new trial, in which it was shown that he was a good business man, of fine reputation, but without experience in administering estates.

All the parties except Col. Smith appealed and have assigned errors.

It is not necessary to take up these assignments *seriatim*.

We are of opinion that the proceedings in the circuit court upon the appeal from the county court were irregular.

It was error to allow the petitions of James and Thomas Wooten to be filed.

Our statute provides that letters of administration

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shall be granted by the county court of the county where the intestate had his usual place of residence at the time of his death. Shannon's Code, section 3934.

There is no authority of law for the appointment of an administrator by the circuit court.

The jurisdiction of the circuit court over matters pertaining to the appointment of administrators is appellate only.

Section 3940 of Shannon's Compilation provides that any person who claims the right to execute the will or to administer upon the estate of an intestate, who thinks himself injured by an order of the court (meaning the county court) in granting letters testamentary or of administration, may appeal to the circuit court of the county in which the order is made, on giving bond as in other cases of appeal.

The original act from which the above provision of the Code was taken was passed in 1794, and contained the following, in addition to what has been quoted: "And such circuit court is hereby declared to have cognizance thereof, and shall at their sitting next succeeding such appeal, determine the same, and upon such determination had, such court shall proceed to grant the letters to the person entitled to the same, he or she giving bond, with sufficient security, for the faithful discharge of the trust." Caruthers & Nicholson's Comp. St. 1836, p. 76.

This provision for the appointment of administrators

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by the circuit court was not brought forward into the Code of 1858, but was omitted therefrom.

And since the adoption of that Code the circuit court is without authority to grant letters of administration, and the proper practice is for that court, upon the determination of the appeal, to remand the cause for the issuance of letters.

Likewise the county court is the proper and only tribunal having jurisdiction to revoke or cancel letters improvidently or improperly granted by it.

For the same reason, the action of the circuit judge in hearing new applications for the appointment of an administrator, after declaring that neither Judge Allen nor Mr. Frizzell was entitled to the administration, was irregular and unauthorized, and the appointment of Baxter Smith as administrator by the circuit court was without legal authority.

Neither Mr. Smith nor the Wootens had, so far as the record shows, made an application for appointment to the county court, and their claims were not considered by that court, and their right to the office was not involved in the appeal to the circuit court.

The only question before the circuit court upon the appeal was the question whether either Judge Allen or Mr. Frizzell was entitled to the administration.

It is true that while the appeal was pending in the circuit court that court had jurisdiction and power to make all amendments, and, if necessary, to introduce new parties to determine the questions involved and contest-

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ed in the county court, and the proceedings in that court were *de novo*; but it had no power to consider the application of any one who was not a party to the contest in the county court.

As is said in the case of *Wilson v. Frazier*, 2 Humph., 31: "There must be a dispute and contest on the subject in the court of probate, to confer on the circuit court jurisdiction over the matter by appeal or certiorari. If, when the grant of administration was made to the defendant by the county court, the plaintiff had presented her claim, she could have taken her case to the circuit court by appeal or certiorari, according to the circumstances. Not having done so, the proceeding to repeal the letters, once granted, must originate in the county court. Without this, the circuit court has no jurisdiction over the matter."

This was a case in which the widow was attempting in the circuit court to set up her right to the administration over a party who had already been appointed in the county court, and for that purpose she filed a petition in the circuit court praying for writs of certiorari and supersedeas.

In Pritchard on Wills and Administration, section 46, it is said: "If there are several claimants to the administration, they must be brought before the county court and make their claim there, and a claimant may appeal to the circuit court from an adverse decision of the county court; but, if claimants do not appear before the

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county court to assert their rights, they cannot afterwards question the right of grant of letters to another."

The same author, in section 547, says: "The right to appeal is limited to persons who claim the right to letters—that is, to those who appear before the county court and assert their claims, and so become parties to a controversy in that court—and the appeal lies only from the final judgment of the county court against a party to the contest made in that court. If no controversy is made in the county court, no right of appeal exists, but the claimant must make application for a revocation of the letters."

As we have already held, the only question before the circuit court was the one raised between Judge Allen and Mr. Frizzell in the county court, and brought by appeal to the circuit court, and involves the question whether the county court properly decided the matter in litigation between these two parties, as to whether either should be appointed.

We now address ourselves to the consideration of this question.

The county judge declined to grant letters of administration to Judge Allen upon two grounds—one, that the next of kin had no right or power to name the administrator; and the other, that, even if such right existed, Judge Allen was not a disinterested person, but represented certain parties to the litigation in the contest of the will, as attorney, and had made the compromise agreement heretofore referred to, which, it was claimed,

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prejudiced the rights of parties whom he did not represent, and that he was morally obligated, and had expressed his determination, to do all in his power to carry out the compromise and execute it according to its terms.

We have heretofore referred in a general way to the compromise agreement which was procured by Judge Allen in order to settle the matter of the contest of the will.

We think it important to set out these agreements more in detail: First, the agreement he made with Mrs. Martha E. Hudson provides, among other things, as follows: "The attorneys of said Martha E. Hudson, by the consent of their client, Martha E. Hudson, consent for said will to be set aside, on the grounds of insanity of said Mary J. Wooten, deceased, at the time said will was made and on the grounds that said will was procured to be made by fraud and undue influence, contrary to the former expressed wishes and intentions of said Mary J. Wooten, deceased, for and in consideration that said Martha E. Hudson shall be allowed to receive one-third of the net proceeds of said estate, in full of her share of said estate, and also that she shall be allowed to keep and retain the household furniture which has been already shipped to her home, and the jewelry mentioned in items 12 and 13 in said will without charge; which terms are approved, consented and agreed to by said attorneys for contestants, it being understood that all the attorney's fees and expenses of said suit for plaintiff, J.

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R. Sneed, executor, be paid out of the general estate and also the fees of said Turney and Ashcraft; that is Turney's and Ashcraft's combined and aggregate fees it is agreed shall be five thousand dollars, which shall be paid out of the general estate.

"It is further stipulated as a part of this compromise that the said estate of Mary J. Wooten, deceased, shall be administered as if the deceased had died intestate and that John T. Allen shall be appointed and qualified as such administrator as soon after the verdict of the jury setting aside said will as said appointment can be made by the county court, it being agreed that said administrator shall distribute said estate as soon as practicable according to the terms of this agreement; and if necessary, that said administrator shall file a bill in chancery for authority to settle and distribute said estate according to the above agreement.

"Witness our hands this July 25th, 1904."

The second agreement stipulated that Mr. Atwell should receive a net income of \$100 per month from the property of the estate (being the income from two storehouses), while the will had given him the income from only one of these storehouses, and that there should be expended out of said estate upon the improvement of said houses the sum of \$2,000.

The third agreement was made with the attorneys who had represented the executor, and this stipulated that \$20,000 should be paid out of the estate to these

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parties as compensation to the executor and attorneys for services in connection with the estate.

It thus appears that Judge Allen stood committed to the payment of these sums out of the estate, and further to distribute to Mrs. Hudson one-third of the estate, instead of one-fourth, to which she was legally entitled in case of the intestacy of Miss Wooten.

It also appears that Judge Allen's fees as attorney had been agreed upon with the parties whom he represented, and were to be paid by them, but that his fees as administrator were to be paid, in addition, out of the estate. The decree entered by the county judge, in refusing to appoint Judge Allen, states the following as the grounds for such refusal, to wit: That the dismissal of the contest proceedings "was the result of a compromise settlement entered into by an agreement between these petitioners, on the one part and the attorney for the proponents of the will, on the other part, by which it was agreed and stipulated what should be the distributive share of each of the heirs joining in this petition, six of whom are minors, and it was also agreed what amount should be paid as compensation for the services of the said executor, now deceased, and his attorneys in said contest suit; and it not appearing to the satisfaction of the court that the compromise entered into, whereby said suit was dismissed, is for the best interests of said minors, and it appearing that, at the time said compromise was effected and said suit was dismissed, that said estate of Mary J. Wooten, deceased, was not

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represented in the person of any administrator, and it further appearing that the administrator appointed by this court will have presented to him the question as to the propriety of carrying out the terms of said compromise settlement and it further appearing that said petitioner, Jno T. Allen, is one of the attorneys in said case, and also said petitioner, as attorney, entered into and signed said compromise settlement, and also said petitioner announced upon the hearing of the application for appointment as administrator in this cause his intention, if appointed, to carry out the terms of said compromise settlement, the court is of the opinion that it would not be proper to appoint him as administrator."

It must be borne in mind that Judge Allen represented seven-eighths of the entire estate, after making the settlement which he did with Mrs. Hudson.

There is no charge that he acted corruptly or in bad faith in making the compromises which he made in order to settle the contest over the will.

The most that is said is that Judge Allen in these compromises took care to protect his own interests and those of his client to the full extent, and that, in order to effect the settlements and compromises, he diverted a considerable amount of the estate into channels into which it would not have gone if Miss Wooten had died intestate and these compromises had not been entered into.

Judge Allen, in his examination, stated that he intended to carry out these agreements, because he had

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made them, and that they are such contracts and agreements as he thought ought to be carried out, and were to the best interests of all parties; and in the agreement with Mrs. Hudson it is recited that he may, as administrator, file a bill in the chancery court for authority to settle and distribute the estate according to the agreement.

It is evident that the contest over the will was a stubborn one, and the fight to set it aside was a serious one—so much so that Judge Allen described it as “the fight of his life.”

It is evident that, if the will had not been set aside, the interests of all the heirs and distributees would have been lost to them, except that given to Mrs. Hudson.

There can be no doubt, under our statutes and the holdings of our courts, but that the next of kin has the prior right to administer; and the question presented is whether or not such next of kin has the legal right to nominate another in his stead to act as administrator.

Mr. Schouler on Executors and Administrators says: “Even granting, as we must, that the court is not bound by the nomination made by the widow or the kindred first entitled to administer, yet the wishes and preferences of those having the greatest interest in preserving the estate are entitled to great weight; and hence the appointment, at the court’s discretion, of any suitable person upon whom the next of kin entitled to the office, or a majority of them, may agree, is highly favored in American practice—the rights of more remote kindred, credit-

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ors, and all strangers in interest being postponed to their expressed choice accordingly."

Again: "Where the next of kin reside abroad, their resident nominee may receive the appointment; any such attorney, so called, however, being responsible to all parties in interest."

Again: "Inasmuch as the regular administration of estates, whether testate or intestate, is highly favored at the present day, the selection of third persons of integrity, experience, and sagacity for such responsible duties must often be most desirable.

"And if a testator makes such a selection, or associates another with his next of kin or legatees in the trust, for reasons admittedly sound, there seems no good reason why the next of kin themselves, if the estate be intestate, should not exercise a corresponding discretion, and nominate some trustworthy friend, rather than forfeit all claim to administer by failing to qualify personally for the office," Schouler (2d Ed.), pp. 146, 147, section 113.

The same writer says further: "One determining consideration between next of kin in cases of doubt may be their relative extent of interest.

"But another important one is the confidence reposed by kindred, and hence, in cases of conflict, it is not infrequent to appoint the one upon whom a majority of the parties in interest agree.

"The wishes of the party or parties having the largest amount of interest may in other respects preponderate

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in the selection of administrator. The party first seeking the appointment has some claim to preference. These and the other considerations already set forth, which touch rather upon personal suitableness or competency for the trust, the court taking jurisdiction should duly weigh, where controversy has arisen, and grant the administration to such party or parties in the preferred class as shall seem most proper." *Id.*, p. 142, section 110.

Redfield on Wills, vol. 2, p. 74, section 13, says: "Where the person entitled to the effects of the deceased resides out of the State, it is common in England to grant administration to the attorney in fact of such person, under a special power, and to express in the grant that it is for the use and benefit of the party so entitled. But such administrator and his sureties are responsible to the party and to all parties who may be able to show themselves entitled to the effects of the deceased, and cannot exonerate himself by showing personal payment to the person for whose benefit the administration was granted."

Mr. Schouler, in his work on Wills, p. 146, section 113, says: "The appointment at the court's discretion of any suitable person upon whom the next of kin entitled to the office, or a majority of them, agree, is highly favored in American practice; the rights of more remote kindred, creditors and all strangers in interest being postponed to their expressed choice accordingly. Where the next of kin reside abroad, their resident nominee may

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receive the appointment; such attorney, so called, however, being responsible to all parties in interest."

In this case Mrs. Hudson is the next of kin, and was a resident of California, and she joined with the greater portion of the more remote next of kin in asking for the appointment of Judge Allen.

We have several instances in our reports where the court has recognized, if not affirmed, the appointment of the nominee of the next of kin.

In the case of *Feltz v. Clark*, 4 Humph., 79-83, the court, in substance, said that Clark, the nominee of a nonresident next of kin, would not be removed at the instance of a person who was the resident next of kin, after he had marshaled the assets of the estate, paid the debts, and partly distributed the surplus.

In *Varnell v. Loague*, 9 Lea, 161, the court held that a public administrator appointed within six months of the death of the intestate should be removed at the request of the next of kin and the nominee of the next of kin should be appointed in his stead. The court in this case appears to put the nominee of the next of kin upon the same footing as the next of kin themselves, and entitled to preference in administration.

In the case of *Phillips v. Green*, 4 Heisk., 350, it was held that the widow, in exercising her preference under the law, might associate with herself a prudent business man to act with her.

While, therefore, we would not hold that the county court must in any event appoint the nominee of the next

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of kin, yet such nominee should be preferred, and unless there are valid reasons, the nominee should be appointed.

In other words, the next of kin is entitled to have such nominee appointed, if he is a fit and suitable person; and, in determining the question of fitness, the same rules and test must be made as would be if the next of kin were applying in person.

It does not appear to be the policy of our laws to select for an administrator a person not interested in the estate, or one whose interest is not antagonistic to that of other beneficiaries in the estate.

On the contrary, the leading consideration appears to be that the party selected should have an interest in the estate, and it does not matter if such interest is antagonistic to that of the other beneficiaries.

Thus the widow is given preference, though she have an interest opposite or even hostile to that of the distributees. The next of kin, come next without regard to the magnitude of interest he has, or how it may conflict with the interests of others. Then the creditor is next entitled, and the largest creditor has preference, though his interest is necessarily antagonistic to all the other creditors, and indeed to all the distributees.

We think the appointment of Mr. Frizzell was unauthorized, and should not have been made. He was not an applicant, was not the nominee of any interest in the estate, and, it appears, was not acceptable to any inter-

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est in the estate, and was not eligible until after the next of kin and creditors had been given the preference.

His appointment appears to have been made by the county judge upon his own motion, without the knowledge of any of the parties in interest, and without giving them any opportunity to question his fitness. The beneficiaries, who were the next of kin, were not advised that Judge Allen would not be appointed until the county judge brought in the opinion refusing him, and in the same opinion Mr. Frizzell was appointed. No opportunity was given then to the next of kin to present one of their number, or to name another person, or take any other step to procure an acceptable administrator; but they were prevented from doing so by the summary naming of Mr. Frizzell, without their previous knowledge, consent, or concurrence in any way.

The only possible interest that he could have in the estate's administration would be the fees and emoluments of the office or trust.

No opportunity was given to question his fitness for the place, or to name a new nominee or to present one of the next of kin or a creditor.

We do not think that the right of the next of kin to either qualify or name the appointee was exhausted when Judge Allen was refused, but they had the right to be notified that Judge Allen was not acceptable and to have the opportunity offered them to name another appointee.

Moreover, the creditors of Miss Wooten had a right

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to be heard before the county judge should take an outsider and appoint him to the office.

We are of opinion that Baxter Smith is a creditor for some amount, in the sense of our statute giving creditors a preferential, though deferred, right to administer.

We are of the opinion, therefore, that there was no authority for the appointment of Mr. Frizzell at the time and in the manner in which he was appointed, and his appointment is canceled and set aside, as administrator *de bonis non*.

We are also of the opinion that, under the facts of the case, Judge Allen was not eligible to appointment. He does not stand in the attitude of a person interested in the estate, like the widow or next of kin or a creditor, but he occupies the position of an attorney, representing, it is true, large interests and the bulk of the estate; but at the same time he is obligated, as attorney, to carry into effect certain agreements which divert large amounts of the funds of the estate into channels different from the ordinary channels of distribution. Not only is he morally obligated to enforce these agreements, but he has openly and very properly avowed his purpose to do so.

But in order to carry these agreements into effect an administrator should have the sanction of a court of chancery, and an administrator, until this sanction is given, should stand indifferent and unembarrassed by prior obligations.

In making these rulings, we are not in any way reflect-

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ing upon the integrity of character or business qualifications of either Judge Allen or Mr. Frizzell, but simply holding that they are not persons eligible to be appointed—Mr. Allen, because of his attitude as attorney, and his relation to the compromises made, and Mr. Frizzell, because there are others who are entitled in preference to him, and because his appointment was not in consonance with the rules in such cases; and the same may be said as to Mr. Smith.

The judgment of the circuit court will therefore be affirmed as to Allen and Frizzell, and reversed as to Smith, and the cause remanded, with copy of this opinion to the circuit court of Davidson county, with instructions to issue a *procedendo* to the county court, directing the judge of that court to proceed to appoint an administrator *de bonis non* of the estate of Mary J. Wooten. In making said appointment, the next of kin will have preference, unless unfit for the office; next, the appointee of the next of kin, unless unfit; next, the largest creditor; and, in default of these, such person as the county judge may deem most suitable and proper, in accord with the rules herein laid down.

The cost of the proceeding in the several courts will be paid by the administrator *pendente lite* out of the funds of the estate in his hands.

MR. JUSTICE MCALISTER, dissents, and is of opinion that the appointment of Mr. Frizzell was authorized, and should have been affirmed.

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ON REHEARING.

MR. JUSTICE WILKES delivered the opinion of the Court. A petition to rehear is filed in this case and is pressed with earnestness, zeal, and ability.

It is said that the contest in the circuit court was between Judge Allen and Mr. Frizzell, as to which was entitled to the administration, and, the court having determined that Judge Allen was ineligible, it must necessarily follow that Mr. Frizzell should be appointed, and hence that the result reached by the court is incorrect, even if its holding upon the law be correct.

While the language of the court in the original opinion is subject to some verbal criticism, it clearly appears that the court considered the question before it to be whether either Judge Allen or Mr. Frizzell was entitled to the administration, and not which of the two was entitled to administration, and excluding everybody else from consideration.

The application for the appointment of Judge Allen was made by a petition, and this petition was presented by Mrs. Hudson, the next of kin, and by other parties more remotely next of kin, representing seven-eighths of the entire estate. The petition was for the appointment of an administrator *de bonis non*, and Judge Allen was nominated for the appointment. He had been selected by the next of kin, and they claimed the right to make the nomination. The county judge denied them this right. They did not desire to abandon their nomination, but preferred to appeal to a higher court; and this,

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we think, they had a right to do, instead of being forced to surrender their choice and name another. The judgment of the county judge rejecting the nominee of the next of kin on account of his ineligibility was not a finality. The next of kin had the right to bring their choice before a higher court, and have that court pass upon the eligibility of the nominee.

The court, in declaring Judge Allen ineligible, in the same order appointed Mr. Frizzell. From this order the next of kin appealed, and the appeal is specific in stating that it is from the decree rejecting Judge Allen, and also from the decree appointing Mr. Frizzell.

The action of the county judge in appointing Mr. Frizzell in the same order and at the same time left no opportunity to the next of kin to present any other nominee, and there remained no alternative but to appeal.

We think that the action of the next of kin in standing by their choice until his eligibility should be passed on by a revising court was not a waiver of their right to make another nomination in the event the revising court should declare him ineligible; nor was their right of choice exhausted by the fact that their choice was held to be ineligible by the revising court.

It is said that the court did not notice section 3939 of Shannon's Compilation, and this is true.

That section applies to a case where there are more than one next of kin of the same degree applying, and provides that the court may select between them.

In re Wooten's Estate.

It must mean next of kin in the same degree, and not in different degrees.

The condition provided for by section 3939 was not presented by the record, and hence the section was not considered, because it was believed to be not applicable.

We do not understand this present case to be one for the removal of Mr. Frizzell after he had been regularly appointed, and by a collateral proceeding, but it is an attempt, by the aid of the revising court, to prevent the consummation of his appointment.

His appointment was set aside by the appeal, and stands as if it had never been made, and was finally canceled by the effect of the decision of the revising court.

We do not mean to hold that the next of kin may, without limit, insist upon making appointment after appointment, but this right of appointment is limited within reasonable bounds, but at the same time so as not to cut off the reasonable exercise of the right to make appointment.

We have made some verbal alterations in the original opinion, so as to make its language less liable to misconstruction, but have not in anywise changed its effect and holding; nor do we see any reason to do so, after a careful examination of the petition to rehear, and the petition is dismissed.

MR. JUSTICE MCALISTER does not concur.

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FRANK MCGAVOCK v. VIRGINIA-CAROLINA CHEMICAL
COMPANY.*(Nashville. December Term, 1904.)*

1. **MINING LEASES.** Lessee cannot terminate, because minable quantity is found in pockets and not in stratified layers, when.

A lease of right to mine and take phosphate rock from the lessor's land, with the right in the lessee to terminate the lease upon exhaustion of the minable quantity of said rock, cannot be abandoned by the lessee merely because the rock is found in pockets and not in stratified layers, if the rock is sufficient in quantity in either form, especially where the lessee had made repeated examinations and tests of the property before the lease contract was made, and was familiar with, and better able to judge of, the rock than the lessor.

2. **SAME.** Quality of ore must be referred to experts as provided in contract as condition precedent to termination of lease by lessee.

Under a lease of the right to mine and take phosphate rock from the lessor's land, with a provision that, on exhaustion of the rock of a certain quality, the lessee may terminate the lease, and if the quality of rock should, at any time, be called to question by the lessee, the matter should be referred to and settled by certain referees; the lessee has no right to terminate the lease contract on the ground of inferiority of the rock until the inferiority has been tested by the experts named in the contracts, as a condition precedent to the termination of the lease contract by the lessee.

Cases cited and approved: Wadsworth v. Smith, L. R., 6 Q. B., 332; Hanley v. Walker, 79 Mich., 607.

Cases cited and distinguished; Manufacturing Co. v. Collier, 91 Tenn., 525; Hamilton v. Insurance Co., 136 U. S., 242.

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FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

M. H. MEEKS and M. B. HOWELL, for complainant.

JOHN A. PITTS, J. C. BRADFORD and FIRMAN SMITH,
for defendant.

MR. JUSTICE WILKES delivered the opinion of the Court.

Plaintiff made a lease upon his land, to run for twenty years, to the defendant company, with a right of renewal. The terms of the lease gave the defendant exclusive right to mine and take phosphate rock from the land, except certain residence portions, and to construct roads, tramways, buildings, machinery, etc. The company agreed to pay a royalty to the lessor, of twenty-five cents per ton, on all phosphate rock mined and removed from the premises which contained not less than sixty-five per cent of bone phosphate, and not more than four and one-half per cent of oxide of iron and alumina. The minimum, however, was to be \$4,500 per annum, or \$1,125 per quarter; and, in case mining was suspended,

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or the royalty on the rock mined should not in any quarter equal the installment of \$1,125, it was nevertheless to be paid.

The farm was incumbered by a mortgage debt of \$22,000, due to one Alex. Perry. By one of the sections of the contract, it was provided that the royalty to be paid by the said Virginia-Carolina Chemical Company should be applied as follows: (1) To the taxes accrued and lawfully due upon the leased premises; (2) to the interest accruing and due upon the mortgage debt; and (3) \$2,500 per year upon the principal of said mortgage debt for five years; said payments to be made by the lessee directly to the mortgagee; the balance of said royalty during the next five years to be paid to the lessor or his order. The lessee, Virginia-Carolina Chemical Company, agreed to protect the lessor against foreclosure of said mortgage for and during said period of five years, for the balance due thereon, after applying the payments as provided, in case rock of the standard quality, as described in the contract, should not sooner become exhausted; and in case such rock should become exhausted within that period, and the lessee should avail itself of the option given to terminate the lease on that account, then in that event the lessee agreed to give to the lessor twelve months from such termination of the lease in which to arrange for the payment of such mortgage debt.

The company took up the mortgage upon the land, and had it and the notes of McGavock transferred to it.

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It then claimed that the rock was exhausted, and that it had a right to cancel the mining contract, and to foreclose the mortgage which had been transferred to it.

Previous to this it had mined and shipped 1,651 tons of rock. Thereupon this bill was filed to enjoin the company from foreclosing the mortgage, to enforce the terms of the contract, and to have damages for its breach.

The controversy as to whether the contract had been breached, or not, was made by the court of chancery appeals to turn upon the proper construction of one provision of the lease contract.

This provision is in the following words and figures:

"In case the quality of the rock being at any time called in question by the lessee, the same shall be referred to and settled by one of the following referees, in the order herein named—to wit: Prof. W. H. Hollinshead, of Vanderbilt University; Shepard Laboratory, of Charleston, South Carolina; and Pratt Laboratory, of Atlanta, Georgia—the expense of such examination and test to be paid by lessor and lessee in equal parts, and such test to be conclusive upon both parties. The lessee shall not be required to pay for any rock which shall not come up to the standard above prescribed, when the quality shall have been tested in the manner above stated; and if, at any time, the rock upon said premises, coming up to said standard, shall become exhausted, the said lessee shall have the right to terminate this lease and all further obligations resting upon him

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under this contract, except as hereinafter stated in reference to the mortgage hereinafter mentioned."

The controlling finding of the court of chancery appeals, construing this provision of the contract, is in these words, taken from the opinion on the motion to rehear:

"In other words, the essential and fundamental predicate of our opinion was our finding that the phosphate rock upon the premises of complainant had not been exhausted, with respect to its minable quantity, and its quality had not been shown, in the way provided for by the contract, to be of a grade not in accord with the stipulations of the contract, and that, until this is shown by an actual test, by analyzing in the way and mode provided for in the contract, the defendant had no right to abandon it. . . . We must be permitted to say that, in our opinion, the learned counsel of petitioner, the defendant company, misapprehends to some extent, and to a material extent, the basis and underlying fact upon which we decided this case. As stated, the fundamental predicate of our opinion was and is that the proof shows that there is phosphate rock on the premises of complainant, in minable quantities, and that the quality of the rock has not been shown to be inferior in grade to that specified in the contract, in the manner and under the test provided for in the contract, and that until it is ascertained to be of an inferior grade, in the way and manner thus provided in the con-

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tract, the defendant company has no right to abandon the contract."

Counsel for the company thus state their objection to the holding of the court of chancery appeals:

"Our first objection to the conclusions of the court of chancery appeals is that it decides that the Virginia-Carolina Chemical Company could not abandon the contract until after the quality of the rock on the premises had been submitted for analysis to the referees named in the contract, and its quality had been determined to be inferior to that prescribed in the contract. In other words, the court holds that the contract prescribes a tribunal for the determination of the question of quality, and, until that tribunal acts, the lessee could not put an end to the contract, although it otherwise appeared that the rock was exhausted.

In other words, the conclusion of the court of chancery appeals is that the inferior quality of the rock can be determined in no other way than that prescribed in the contract, namely, by submitting the rock to a test by the chemical experts named therein, and that the termination of the contract by the lessee must await the determination by the referees of the question of the quality of the rock.

"We think this conclusion is erroneous, for several reasons. This is not a condition precedent, but is a collateral stipulation, merely. The Virginia-Carolina Chemical Company was not obliged to resort to this method of determining the quality of the rock, but, if

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the quality proved to be deficient, and that fact was ascertained in any other way, the lessee had the right to terminate the contract, and to establish the fact by proof *aliunde*."

Inasmuch as the court of chancery appeals have not found the fact whether minable rock of requisite quality exists on the land to satisfy the requirements of the contract, and have stated their inability to do so, and have based their action upon their construction of the contract, the question, so far as it is presented to us, is whether their construction is the proper one; and, if so, have they made the proper decree thereon?

The question before us is therefore brought within narrow limits.

There can be no question, under the finding of the court of chancery appeals, but that a sufficient quantity of minable rock exists upon the land to satisfy the contract, and the only question is whether that sufficiency is of the prescribed quality.

We are of opinion that the fact that the ore is found in pockets, and not in stratified layers, and may therefore be more difficult to mine, can in no wise affect the merits of the controversy, if the ore is sufficient in quantity in either form; and especially is this so when it appears that the company made repeated examinations and tests of the property at different places before they made the lease contract, and were as familiar with, and better able to judge of, the ore than complainant was.

So, that the question recurs, is the ore of the quality

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stipulated for in the contract, and can this fact be ascertained in any other way than that prescribed by the contract?

The clause in the contract which raises the controversy contains two provisions, both for the benefit of the lessee—one fixing the terms on which the lease may be put an end to, and the other providing that for rock of an inferior quality the lessee shall not be required to pay—but both are dependent upon the fact of inferiority in the rock; the latter relating alone to the rock already mined, and for which pay is demanded, while the former goes further, and touches upon the quality of the rock, whether mined or not. One provision relieves the company from paying for inferior rock, although it has been mined; and the other relieves it from continuing to mine if the rock mined and to be mined is inferior, so that the quantity and quality cannot be obtained.

The determinative finding of the court of chancery appeals is that the rock exists in sufficient quantity, but that its quality has never been tested by the parties in the mode called for by the contract; and, until thus tested, and, by the test prescribed, discovered to be of an inferior grade, and not up to the quality called for by the contract, the defendant company had no right to terminate the contract because of any assumed inferior quality of the rock, or because such inferiority appeared otherwise than by such test.

In other words, the company had no right to terminate the contract on the ground of inferior rock until

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that inferiority was fairly tested and found to exist by the experts named in the contract, and in the order in which they are named.

The court of chancery appeals therefore reversed the holding of the chancellor, and remanded the cause for the purpose of enabling operations to be pursued on this farm in mining rock in accordance with the terms of the contract, and directing that rock properly selected and prepared should, in the presence of both parties, be submitted to the tests of the experts named in the contract, in the order in which they are named, or such other chemists as may be agreed on, and until the inferiority of the rock should be thus demonstrated, and that rock of the proper grade and in minable quantities be demonstrated not to exist, the company should continue to be charged with the royalty provided by the contract, to be credited on the mortgage held by the company.

We are of opinion that the court of chancery appeals is correct in its disposition of the matter.

The parties, when entering into this contract, foresaw that a question might arise as to the quality of the rock which the mines were producing. In advance of such question, and in order to settle the same, it was agreed that the matter of quality, if called in question by the lessee, should be settled by one of certain experts, naming them, and the order in which they were to act.

The case is not the same as *Cole Mfg. Co. v. Collier*, 91 Tenn., 525, 19 S. W., 672, 30 Am. St. Rep., 898, nor *Hamilton v. Ins. Co.*, 136 U. S., 242, 10 Sup. Ct., 945,

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34 L. Ed., 419, in which it was held, in substance, in insurance contracts, that in case of a breach the parties would submit their differences in adjustment to arbitration, and in which the court held that, unless so expressly provided, the agreement to arbitrate was not a condition precedent to a right to sue.

The stipulation in the present contract is not for a submission to arbitration of the rights of the parties in consequence of a breach of a contract, but it is a stipulation naming experts, who, after tests applied, shall determine whether the lessee has a right to refuse to carry on his contract, and this depends upon the result of their tests.

It more nearly assimilates itself to the case where parties, in advance, agree to refer any matter to the decision of an architect, engineer, or other expert, and name the person to decide the question.

In all such cases it is uniformly held that the submission provided for must be carried out, the test applied, and the result reached as a condition precedent to do the thing about which controversy exists. 2 Am. and Eng. Ency. Law, p. 582, and notes; *Wadsworth v. Smith*, L. R., 6 Q. B., 332; *Hanley v. Walker*, 79 Mich., 607, 45 N. W., 57, 8 L. R. A., 207; 3 Elliott on Railroads, 1059.

This view of the case is not only based upon authority, but upon reason.

The parties, in advance, agree as to the manner in which the tests are to be made, and by whom.

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It affords to each the assurance of expert evidence, which they evidently deem most trustworthy and reliable.

Neither has a right to substitute a different test or different persons.

It is to be presumed that the parties have selected the best tests. Whether they have, or not, they have agreed upon them, and neither party can depart from this agreement.

The wisdom of having such a tribunal is exemplified in this case, in which the court of chancery appeals report that after examining a vast mass of testimony, contained in four volumes, of many hundred pages, they are unable to decide the disputed question of quality.

The mode pointed out in the contract, and which that court directs to be observed, is plain and simple, and of all means most easily put in practice, and is in accord with the contract.

We are of opinion, therefore, that the holding of the court of chancery appeals is entirely and eminently correct, and their decree is affirmed.

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HARRIS & COLE BROS. v. COLUMBIA WATER & LIGHT
COMPANY.*

(*Nashville*. December Term, 1904.)

1. **RES ADJUDICATA.** Identity of parties in same capacity or character is essential; case in judgment.

It is essential to the successful defense of former adjudication that the parties must be identical and in the same capacity or character in both suits; and, therefore, where a partnership firm sues in the firm name as a foreign corporation, and the suit is dismissed for failure to comply with the requirements of the statute prerequisite to foreign corporations doing business here, such dismissal is not a bar to a subsequent suit on the same cause of action by the individual members of the partnership, where it is shown that the designation of the partnership firm as a corporation was by mistake of fact. (*Post*, pp. 334 340.)

Cases cited and approved: Railroad v. Atkins, 2 Lea, 248; Melton v. Pace, 103 Tenn., 484; Harris v. Water & Light Co., 108 Tenn., 245; Bank v. Smith, 110 Tenn., 339; Rathbone v. Hooney, 58 N. Y., 463; McBurnie v. Seaton, 111 Ind., 56; Caruth v. Grigsby, 57 Tex., 259; Landon v. Townshend, 112 N. Y., 93; McNutt v. Trogden, 29 W. Va., 469; Morrison v. Clark, 89 Me., 103; Bank v. Shuler, 153 N. Y., 163; Beals v. Cone, 27 Colo., 473; Loftis v. Marshall, 134 Cal., 394; McCall v. Jones, 72 Ala., 368; Tierney v. Abbott, 46 Wis., 320; Tiffany v. Stewart, 60 Iowa, 207; Smith v. Auld, 31 Kan., 262; Richardson v. Richards, 36 Minn., 111.

*As to liability for loss by fire due to lack of adequate water supply, see note to Howsmon v. Trenton Water Co. (Mo.), 23 L. R. A., 146.

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2. SAME. Decision on the merits is essential; case in judgment.

It is essential to the successful defense of former adjudication that the former judgment must have been upon the merits; and, therefore, the dismissal of a suit, because it incorrectly appeared of record that one of the necessary parties plaintiff was a foreign corporation which had not complied with the requirements of the statute prerequisite for the maintenance of suits by foreign corporations, is not on the merits and is not res adjudicata. (*Post*, pp. 334, 339, 340.)

Cases cited and approved: *Hoggatt v. White*, 2 Swan, 265; *Hurst v. Means*, 2 Sneed, 546; *Hughes v. United States*, 4 Wall., 232.

3. ADMISSIONS. In unsworn pleadings by innocent mistake do not conclude the parties, when.

Admissions by mistake innocently made in unsworn pleadings which have worked no detriment to the adverse party will not estop such admitter to show the truth in a subsequent suit; as where a partnership firm erroneously admitted that it was a foreign corporation, and the suit is dismissed for failure to comply with the requirements of the statute prerequisite to maintenance of suits by foreign corporations, the members of such partnership firm are not estopped to bring a subsequent suit on the same cause of action. (*Post*, pp. 340, 341.)

Cases cited and approved: *Hamilton v. Zimmerman*, 5 Sneed, 39; *McLemore v. Railroad*, 111 Tenn., 689.

4. PROXIMATE CAUSE. Failure to furnish water sufficient to extinguish fires within the terms of the contract.

Where a water company agreed to supply, at all times an amount of water sufficient to extinguish fires, its failure to do so, which resulted in the destruction, by fire, of property within the contemplation of the contract, was the proximate cause of the loss. (*Post*, p. 341.)

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5. **DAMAGES.** For loss of property by fires for failure to furnish water as contracted, are not too vague and indeterminate to authorize a recovery.

Where a water company contracts to supply, at all times an amount of water sufficient to extinguish fires, and a loss results from destruction, by fire, of property within the contemplation of the contract, by its failure to furnish the water, the claim of damages for the breach of the contract is not too vague and indeterminate to authorize a recovery. (*Post*, pp. 341, 342.)

6. **SAME.** For breach of contract to furnish water for extinguishment of fires is the value of the property destroyed, and not merely the value of the water that should have been furnished.

Where a water company contracts to supply, at all times an amount of water sufficient to extinguish fires, and a loss results from destruction, by fire, of property within the contemplation of the contract, by its failure to furnish the water, the measure of damages is full indemnity for the loss resulting from the breach, and not merely the value of the water which should have been furnished under the contract. (*Post*, pp. 342, 343.)

Cases cited and approved: *State v. Ward*, 9 Hels., 132; *Foster v. Water Co.*, 3 Lea, 46; *Chisholm v. Canopy Co.*, 111 Tenn., 202.

FROM MAURY.

Appeal from the Chancery Court of Maury County.—
WALTER S. BEARDEN, Chancellor.

H. P. FIGURES, J. B. McLEMORE and G. T. HUGHES,
for complainants.

T. M. STEGER and W. S. FLEMING, for defendant.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The bill in this case was dismissed upon the ground that the issues presented by it had been determined against the complainants by a court having jurisdiction of the subject-matter and of the parties. The facts upon which this decree of dismissal rests are as follows: In 1903 N. H. Harris, R. Harris, and Cole Bros., styling themselves as the firm of Harris & Cole Bros., brought a suit in the circuit court of Maury county, for the use of themselves and certain fire insurance companies named therein, against the Columbia Water & Light Company. In their declaration the plaintiffs alleged that Cole Bros., a member of the firm, was a corporation organized under the laws of the State of Iowa, and that the firm so constituted was engaged in the lumber business in the city of Columbia, in this State, and that on their yards in that city they had stored large quantities of lumber, and had erected for the use of their business costly buildings, in which they were operating much valuable machinery. The declaration further alleged that the firm of Harris & Cole Bros. had entered into a contract with the defendant company whereby, for a consideration, that company agreed and obligated itself to furnish, at the fire plugs located on the premises of the firm, an ample supply of water at all times adequate in force, volume, and quantity to produce a stream of water flowing through hose and fire nozzles to throw upon the buildings, lumber, material, and machinery

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sufficient to extinguish any and all fires that might originate or be upon the premises. The declaration further alleged that, after the making of this contract, fire originated on the premises of this firm, and that by reason of neglect and failure of the defendant company to have and keep a sufficient supply of water for use in the extinguishment of fire, as it was bound to do by the contract referred to, the lumber, material, buildings and machinery of this firm were consumed, so that the loss accruing to the firm therefrom was \$50,000. The plaintiffs also averred that at the time of this fire they had in force policies of insurance on the property in certain fire insurance companies named in the declaration, and that these companies had paid to the plaintiffs the amounts set out therein and that by the terms of the policies these companies were entitled, to the extent of the payments made by them severally, to be substituted to any right of action which the plaintiffs might have, and that, to the extent of their payments, a share and interest in the right of action set up in this declaration had been assigned to these companies. It was alleged that the payments made by these companies in the aggregate was greatly less than the loss sustained by the firm, and the suit therefore was instituted not only for the use of the insurance companies, but of the firm as well. To this declaration certain pleas were filed, in which it was alleged that Cole Bros. was a foreign corporation, and that it had not complied with the laws of Tennessee in the matter of registration of its charter, and that the

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firm of which it was a constituent member had no right, under the laws of Tennessee admitting foreign corporations to do business in this State, to enter into the contract for the breach of which recovery was sought.

To these pleas the plaintiffs filed a replication in which it was admitted that Cole Bros. was a foreign corporation, and that it had failed to comply with the statutory requirements with regard to such corporations entering the State to do business, but denied that the firm of Harris & Cole Bros. were unlawfully doing business in Tennessee. On these special pleas and this replication the circuit court dismissed the suit, and on appeal to this court the judgment of the lower court was affirmed upon the ground that an action by a firm could not be maintained unless all the partners in the firm were competent to sue, and that a firm composed of individuals and a foreign corporation could not maintain an action upon a contract made in this State, where it appeared that the corporation had not complied with the statutes requiring it to register its charter. *Harris v. Water & Light Co.*, 108 Tenn., 245, 67 S. W., 811.

The bill in the present case is brought by N. H. Harris, Rutledge Harris, J. W. Cole, W. R. Cole, and John J. Cole, trading under the firm name and style of Harris & Cole Bros., against the Columbia Water & Light Company, for the same breach of the same contract, and under the same conditions alleged in the former suit, and a recovery is sought for this breach for the use of the firm of Harris & Cole Bros. and the same insurance

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companies named in the declaration in that suit. The bill alleges that at the time of the institution of the former suit N. H. and Rutledge Harris, the members of the firm resident in this State, and who had the management thereof, supposed that Cole Bros. was a corporation, and so informed the attorneys representing the firm, and the allegation in the declaration and the admission in the replication that it was such was made in good faith, but subsequent to the rendition of the judgment in the circuit court, and pending the appeal of the case to this court, it was discovered that this averment was a mistake of fact; that, while Cole Bros. had been a corporation existing under the laws of Iowa, its existence as such had been terminated before the making of the contract in question and the institution of the suit, and the three parties named, to wit, J. N., W. R., and John J. Cole, at both periods were in fact doing business as partners under that name, and as individuals were members of the firm of Harris & Cole Bros.

The chancellor held, on a demurrer raising the question, that the adjudication in the former suit was conclusive upon the complainants in the present case, and dismissed their bill.

Was the chancellor correct in this ruling, and is the matter now sought to be litigated *res adjudicata*? Two of the essentials to the successful defense of former adjudication are that there must be identity of parties in the two actions, and the judgment in the prior action must have been upon the merits. As to the first of these

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essentials, we think that the complainants in the present action are not identical with the plaintiffs in the first suit. In the present action the three Cole brothers as individuals, join in this suit with the two Harrises, alleging that they constitute the firm of Harris & Cole Bros., while in the former Cole Bros. was treated as a corporation. It is manifest that there is no identity between a corporation styled Cole Bros. and a firm of that name composed of individuals. The contract, for the breach of which recovery is sought, was, according to the averment of this bill, made with the firm of Harris & Cole Bros., composed of the two Harrises and of the three Coles. It is clear that where the contract was made with these individuals, constituting the firm, it was necessary that all the obligees should unite as plaintiffs in an action for the breach thereof, as the cause of action was joint only. If the former suit had been instituted by any one or more of the members of the firm, seeking a recovery for a breach, and it had appeared upon the face of the declaration that there were other members of that firm who had not joined as plaintiffs, the declaration would have been demurrable, or if it had not been so averred, but the fact had developed in proof, the variance between the pleading and proof would have been fatal to the plaintiffs' action. In the former suit, which is relied upon as a bar to the present, it was held that, in suits upon partnership contracts, all the members of the firm must unite in the suit. It was there said that there was no such thing

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recognized in the jurisprudence of this State as the legal entity of a partnership, but that the suit by a firm was nothing more than the suit of the individual members of the firm; the court adding, "It is apparent that, in the face of this rule, neither one of the members, nor any number less than all, could maintain the present suit." So that it was there held that the corporation of Cole Bros. was an indispensable party to that action, and, being disqualified under our statutes to enter into contracts in this State, the action by the firm of which this corporation was a member could not be maintained. It would seem manifest that, if a firm so constituted could not recover upon a contract averred in that case, it equally could not on the one which is set up in the present; it being a contract between wholly different parties.

In section 536, volume 2, of his work on Judgments, the author, Mr. Black, says: "It is not only necessary that the person sought to be bound by the former judgment should have been a party to both actions, but he must have appeared in both in the same capacity or character." The author embodies in his text a paragraph from the opinion in *Rathbone v. Hooney*, 58 N. Y., 463, which is as follows: "A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is, in contemplation of law, a distinct person, and a stranger to the prior proceedings and judgment."

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This rule which is announced as one of the fundamentals of both civil and common law jurisprudence on the subject is illustrated by Mr. Black by a reference to a great variety of cases from many different courts. Among these supporting the text are cited *McBurnie v. Seaton*, 111 Ind., 56, 12 N. E., 101; *Caruth v. Grigsby*, 57 Tex., 259; *Landon v. Townshend*, 112 N. Y., 93, 19 N. E., 424, 8 Am. St. Rep., 712; *McNutt v. Trogden*, 29 W. Va., 469, 2 S. E., 328. In addition to the authorities supporting this rule cited by this author, reference may be made to *Morrison v. Clark*, 89 Me., 103, 35 Atl., 1034, 56 Am. St. Rep., 395; *First Nat. Bank v. Shuler*, 153 N. Y., 163, 47 N. E., 262, 60 Am. St. Rep., 601; *Wells v. Cone*, 27 Colo., 473, 62 Pac., 948, 83 Am. St. Rep., 512; *Loftis v. Marshall*, 134 Cal., 394, 66 Pac., 571, 100 Am. St. Rep., 286.

The corollary of this rule is thus stated by Mr. Freeman in his work on Judgments, in volume 1, section 266: "A judgment given because of misjoinder or nonjoinder of parties, plaintiffs or defendants, or because of the want of capacity of the party plaintiff or defendant to sue or to be sued, establishes nothing but such defect or incapacity, and cannot defeat a subsequent suit in which the vice existing in the former suit does not exist." The author cites the following cases, which upon examination are found to support his text: *McCall v. Jones*, 72 Ala., 101; *Tierney v. Abbott*, 46 Wis., 329, 1 N. W., 94; *Tiffany v. Stewart*, 60 Iowa, 207, 14 N. W., 241; *Smith v.*

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Auld, 31 Kan., 262, 1 Pac., 626; and *Richardson v. Richards*, 36 Minn., 111, 30 N. W., 457.

Our own reports furnish illustrations of this rule, and all it implies. In the case of *L. & N. R. R. v. Atkins*, 2 Lea, 248, Atkins sued the railroad for killing a horse; and the defendant pleaded a former suit by Atkins and wife against it for killing the same animal, and a judgment in his favor. It was ruled, however, by this court, that the defense was not maintainable. On this point it was said that the "authorities are uniform that, to make a judgment a bar, the former must be between the same parties. . . . Ordinarily a judgment in the suit would not be a bar to a suit brought by either of those two, for the obvious reason that a joint cause of action in favor of two cannot possibly be a cause of action in favor of one of those two." In *Melton v. Pace*, 103 Tenn., 484, 53 S. W., 939, the rule was recognized that, in order to make a judgment effective as *res adjudicata*, it is essential that the party sought to be concluded thereby should have sued or been sued in both cases in the same capacity or character, and to enforce the same right. And so it was there held that children inheriting from both father and mother were not estopped to set up title to the whole of a tract of land inherited from their mother by reason of the fact that a part of it had been by inadvertence embraced in the description of a tract which they, as heirs of their father, had brought to sale by decree of foreclosure of a

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mortgage. See, also, *Bank v. Smith*, 110 Tenn., 339, 75 S. W., 1065.

Another one of the essentials to this plea, as we have already seen, is that the former judgment must have been upon the merits of the case. In *Hughes v. U. S.*, 4 Wall., 232, 18 L. Ed., 303, it is said: "If the first suit was dismissed for defect of pleading or parties or a misconception of the form of the pleading, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." The rule is thus stated by Mr. Black in section 693 of volume 2 of his work on "Judgments": "A former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless the proceeding and judgment in the first case involved an investigation or offered full legal opportunity for an investigation and determination of the merits of the suit. Or as otherwise expressed, the judgment must be upon the merits in a competent action; the plaintiff having sued in his proper character, and the pleading having been correct." Among the cases in which this rule has been recognized and applied by this court we will refer to two: In *Hoggatt v. White*, 2 Swan, 265, the facts were that one B. executed a mortgage of a slave to W. to secure a note which upon its face called for ten per cent interest per annum. After maturity W. filed a bill to foreclose the mortgage, which was dismissed by the chancellor upon the ground that the contract sought to be enforced was,

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upon its face, illegal. Subsequently the mortgagor brought suit against the mortgagee, who, being in possession of the slave, was proceeding to sell under the mortgage, and sought to recover the same, insisting that the decree in the suit for foreclosure was a determination of all the rights of the mortgage; but it was held that, the complainant having been repelled upon the ground of illegality, the decree pronounced in the first suit could not be relied upon by the mortgagor as an adjudication of the facts in controversy in the second suit.

In *Hurst v. Means*, 2 Sneed, 546, it was held that where the plaintiff had brought his action to recover the amount of purchase money paid by him for land, the title to which had failed, but from which he had not yet been evicted, and there was verdict and judgment against him on that ground, this was no bar to subsequent suit for the same cause of action after he had lost possession of the land.

So we hold that the doctrine of *res adjudicata* cannot be relied upon in this case, because, first, there is a lack of identity between the parties plaintiff in the first action and the complainants in this cause; and, second, for the reason that the merits of the suit were not determined in the first action. In ruling otherwise the chancellor was in error.

The defendants, however, insist that the complainants are estopped by the admission made in this former judicial proceeding that Cole Bros. was a corporation. This defense is equally unavailing to preclude the complain-

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ants from avoiding the effect of the mistake of fact made by them therein. This mistake, according to the bill in this case, was innocently made, in unsworn pleadings, from which, so far as the record shows, no detriment has been worked to the defendant. Such a pleading under these conditions comes within the case of *McLemore v. Railroad*, 111 Tenn., 639, 69 S. W., 338. The rule of estoppel is applied with peculiar force to admissions or statements made under oath in a pending cause, but even they may be relieved against where made inconsiderately or by mistake. *Hamilton v. Zimmerman*, 5 Sneed, 39.

The defendant's insistence, however, over and beyond the defenses to the bill of complainant just disposed of, is that the bill is fatally defective in failing to show that the damages claimed by complainants proximately resulted from the breach of the contract on the part of the defendant to furnish water. This is a mistaken assumption. The bill distinctly avers that the defendant contracted to supply at all times an amount of water ample to extinguish fires, and failed to do so, and that this failure was the occasion of the loss sustained by complainants. The failure to furnish water did not occasion the fire, but it is averred that it did bring about the loss resulting from the fire. To prevent this loss by supplying a quantity of water sufficient to extinguish any fire which might occur was within the letter of the contract.

Nor do we think that another position assumed by the

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defendant is any more tenable, and that is that the damages claimed were too vague and indeterminate to authorize a recovery thereof. Granting the averments of the bill to be true, it is as easy in this case to ascertain the value of the loss incurred as it would be in any case where a party was undertaking to recover damages for property which it was alleged was wrongfully destroyed.

Again, it is insisted by the defendant that, at the utmost, complainants can only recover the value of the water which should have been furnished them under the contract, and not the value of the property destroyed. It is true that, where an action is brought to recover for a breach of a contract, "the contract itself must give the measure of damages," yet, in the light of the averments of the bill in this case, it was clearly within the contemplation of the parties to this contract that, if it was breached by defendant, then it should furnish full indemnity of the damages resulting from the breach. This question has been fully considered in *Chisholm v. U. S. Canopy Co.*, 111 Tenn., 202, 77 N. W., 1062, and we can add nothing to the argument or conclusion of that case. The cases of *State v. Ward*, 9 Heisk., 132, and *Foster v. Water Co.*, 3 Lea, 46, relied upon by the counsel of defendants to bring complainants' recovery within the narrowest limits, are referred to and construed in the *Chisholm* case, and are brought in accord with it. It is true that there are expressions in the *Foster* case which seem in conflict with the rule an-

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nounced here, but they are not called for by the issues involved and, being dicta, cannot be regarded as authority on the question with which we are dealing.

The result is, the chancellor's decree dismissing the bill is reversed, and the cause is remanded for further proceedings.

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J. Y. WHITLOW v. NASHVILLE, CHATTANOOGA & ST.
LOUIS RAILWAY COMPANY.

(*Nashville.* December Term, 1904.)

1. **FOREIGN STATUTES.** Rights of action under statutes of other States enforced here.

The courts of this State have the power to enforce, and constantly do enforce, rights of action granted under foreign statutes or statutes of other States. (*Post*, p. 348.)

Cases cited and approved: Railroad v. Sprayberry, 8 Bax., 341, and 9 Heis., 852; Hobbs v. Railroad, 9 Heis., 873; Railroad v. Foster, 10 Lea, 351; Railroad v. Lewis 89 Tenn., 235; Railroad v. Reagan, 96 Tenn., 128, 136, 137.

2. **SAME.** Same. Must be pleaded and the remedy prescribed must be pursued.

But in such cases, where the right of action is unknown to the common law, the foreign statute must be pleaded, and the remedy prescribed by it must be pursued. (*Post*, p. 348.)

Cases cited and approved: Railroad v. Sprayberry, 9 Heis., 852, 854; Railroad v. Foster, 10 Lea, 351, 359, 365; Railroad v. Reagan, 96 Tenn., 128, 136, 137.

3. **SAME.** Same. But penal statutes of another State will not be enforced here.

But no State will enforce the penal laws of another State imposing punishment for offenses committed against the State, and not merely affording redress for wrongs to the individual. (*Post*, pp. 348-350.)

Cases cited and approved: Huntington v. Attrill, 146 U. S., 657; Wisconsin v. Insurance Co., 127 U. S., 265.

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4. **SAME.** Whether the statute of another State is penal is to be determined by the trial court.

In determining whether a statute of a foreign State or of another State is penal, so as to deny jurisdiction to the courts of this State in which an action thereon is brought, our courts are not absolutely bound by the construction placed upon such statute by the courts of the State which enacted it, but this is to be determined by the court in which the suit is brought. (*Post*, p. 350.)

Case cited and approved: *Huntington v. Attrill*, 146 U. S., 657.

5. **SAME.** Personal injury statute of Alabama enforced here.

The statute of the State of Alabama, giving a right of action for personal injuries resulting in death, is not a penal statute in the sense that will prevent the courts of this State from entertaining an action based thereon. (*Post*, pp. 350-355.)

Numerous cases in Alabama and other cases are cited in the opinion on pages 350-354.

6. **SAME.** Same. Personal injury statute of Alabama is not so repugnant to our policy as to prevent its enforcement here. The right of action for personal injuries resulting in death, given by the statute of Alabama, is not so repugnant to the public policy of our State as to prevent an action based thereon in the courts of our State. (*Post*, pp. 355-357.)

Cases cited and approved: *Dennick v. Railroad*, 103 U. S., 593; *Railroad v. Cox*, 145 U. S., 593; *Huntington v. Attrill*, 146 U. S., 657; *Railroad v. Babcock*, 154 U. S., 190; *Stewart v. Railroad*, 168 U. S., 445, 448, 449; *Herrick v. Railroad*, 31 Minn., 11.

- 7 **SAME.** Same. Enforcement of personal injury statute of Alabama will not be refused for dissimilarity between it and our statute.

Our courts will not decline, in a proper case, to entertain an action for personal injuries resulting in death based on the statute of Alabama, because of dissimilarity between its provisions

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as to damages, and those of our own statute upon the same subject. (*Post*, pp. 348, 357-359.)

8. REVERSAL. Where verdict is so excessive as to evince passion, prejudice, or caprice.

The constitution of our courts is such, and the relation between the court and the jury is of such a character, under our laws, that the trial judge has always, and the supreme court on appeal has always, the power to set aside verdicts on the ground that the amount found is so large as to evince passion, prejudice, or caprice, and such seems to be the rule in Alabama. (*Post*, pp. 359, 360.)

Cases cited and approved: *Railroad v. Mallette*, 99 Ala., 209, 217, 218; *Furniture Co. v. Little*, 108 Ala., 399; *Railroad v. Burgess*, 119 Ala., 555, 564, 565.

FROM MARION.

Appeal from the Circuit Court of Marion County.—
S. D. McREYNOLDS, Judge.

STEWART & STEWART and CHARLES C. MOORE, for
Whitlow.

SPEARS & SPEARS and CLAUDE WALLER, for Railroad.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the circuit court of Marion county to recover damages for the wrongful death of one

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John Whitlow, who it is alleged was killed on the line of the defendant's railway in the town of Bridgeport, in the State of Alabama. The action is based upon section 27 of the Code of 1896 of that State. It also appears as section 2589 of the Code of 1886. The original act on which these sections were based was passed on the 5th of February, 1872. The statutory provision above referred to reads as follows:

"A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate."

Two points were made by the defendant in the court below on this statute, and both were sustained, and as a result of sustaining these objections the plaintiff's act-

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ion was dismissed. We need not state with particularity the method by which the points were raised. It need only be said that they were sufficiently presented.

From the action of the court below the plaintiff appealed, and the matter is now before us for consideration.

The first point made is, in substance, that the statute of Alabama above referred to is a penal statute, and being so, cannot be enforced in the courts of this State. The second is that the statute of Alabama under which this suit is instituted and the statute of Tennessee giving a right of action in case of wrongful death are so dissimilar in their purposes and enforcement that the courts of Tennessee will not undertake to enforce the Alabama statute.

1. The courts of this State have the power to enforce, and constantly do enforce, rights of action under foreign statutes. *R. R. v. Sprayberry*, 8 Baxt., 341, 35 Am. Rep., 705; *Id.*, 9 Heisk., 852; *Hobbs v. R. R.*, 9 Heisk., 873; *R. R. v. Foster*, 10 Lea, 351; *R. R. Co. v. Lewis*, 89 Tenn., 235, 14 S. W., 603; *R. R. v. Reagan*, 96 Tenn., 128, 136, 137, 33 S. W., 1050. But in such cases, where the right of action is one unknown to the common law, the foreign statute must be pleaded, and the remedy prescribed by it must be pursued. 9 Heisk., 852, 854, 96 Tenn., 128, 136, 137, 33 S. W., 1050; 89 Tenn., 235, 14 S. W. 603; 10 Lea, 351, 359, 365.

2. But no State will enforce the penal laws of another State. Penal laws, however, strictly and properly

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are those imposing punishment for an offense committed against the State. The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. *Huntington v. Attrill*, 146 U. S., 657, 13 Sup. Ct., 224, 36 L. Ed., 1123. In that case it is said, quoting with approval from *Wisconsin v. Pelican Insurance Company*, 127 U. S., 265, 8 Sup. Ct., 1370, 32 L. Ed., 239:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." Again: "For the purpose of extraterritorial jurisdiction it may well be that actions by a common informer, called, as Blackstone says, 'popular actions, because they are given to the people in general,' to recover a penalty imposed by statute for an offense against the law, and which may be barred by a pardon granted before action brought, may stand upon the same ground as suits brought for such a penalty in the name of the State or of its officers, because they are equally brought to enforce the criminal law of the State." Again, it is said: "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to pun-

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ish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

3. In determining the question, whether a statute of a foreign State is penal in the international sense, so as to deny jurisdiction to the tribunals of a foreign State in which an action thereon is brought, such tribunals are not absolutely bound by the construction placed upon such statutes by the courts of the State which enacted it. "The test," said the court, in *Huntington v. Attrill*, supra, "is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person. In this country the question of international law must be determined in the first instance by the court, State or national, in which the suit is brought."

4. The right of action given by the Alabama statute sued on in this case is not a penal one in the international sense of the term.

It is true that in construing this statute, or a prior one of similar purport, the supreme court of Alabama has held that it is not necessary to aver that the intestate left a widow, children, or next of kin (*Railway Co. v. Waller*, 48 Ala., 459); and that evidence of loss of services, or mere pecuniary loss is immaterial and irrelevant (*Railroad Co. v. Freeman*, 97 Ala., 289, 11 South.,

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800; *Railroad Co. v. Shearer*, 58 Ala., 672; *Buckalew v. Ry. Co.*, 112 Ala., 146, 20 South., 606; *Railway v. Burgess*, 116 Ala., 509, 22 South., 913); and that evidence as to age, physical and mental condition, and earning capacity, and occupation of plaintiffs' testator or intestate and the amount of money contributed by him from his earnings to the support and maintenance of those dependent upon him, is immaterial and incompetent (*Railroad Co. v. Tegner*, 125 Ala., 593, 28 South., 510). It is also true that the court in several opinions (*Railroad Co. v. Shearer*, supra; *Railroad Co. v. Sullivan*, 59 Ala., 279; *Railroad Co. v. Freeman*, supra), has referred to the damages to be assessed under the statute as "a pecuniary mulct," "a punishment or fine," against the wrongdoer, to be distributed by the administrator as personal property. Yet no one can read the foregoing authorities, and other decisions of the supreme court of Alabama on cases arising under this statute (*Tanner's Ex'r v. Railroad Co.*, 60 Ala., 621; *Railroad v. Copeland*, 61 Ala., 376; *Cook v. Railroad Co.*, 67 Ala., 533; *Railroad Co. v. Womack*, 84 Ala., 149, 4 South., 618; *Bentley v. Railroad Co.*, 86 Ala., 484, 6 South., 37; *Railroad Co. v. Black*, 89 Ala., 313, 8 South., 246; *Leak v. Railroad Co.*, 90 Ala., 161, 8 South., 245; *Railroad Co. v. Vaughan*, 93 Ala., 209, 9 South., 468, 30 Am. St., Rep. 50; *Railroad Co. v. Meadors*, 95 Ala., 137, 10 South., 141; *Railroad Co. v. Dobbs*, 101 Ala., 219, 12 South., 770; *Railroad Co. v. Martin*, 117 Ala., 367, 23 South., 231; *Railroad Co. v. Bush*, 122 Ala., 470, 26

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South., 168; *Armstrong v. Street Railway Co.*, 123 Ala., 233, 26 South., 349; *Shannon v. Jefferson County*, 125 Ala., 384, 27 South., 977; *Railroad Co. v. Foshee*, 125 Ala., 199, 27 South., 1006; *Railroad Co. v. Bryan*, 125 Ala., 297, 28 South., 445; *Railroad Co. v. Mitchell*, 134 Ala., 261, 32 South., 735; *Railroad Co. v. Hamilton*, 135 Ala., 343, 33 South., 157; *Railroad Co. v. Shelton*, 136 Ala., 191, 34 South., 194; *Railroad Co. v. Guest*, 136 Ala., 348, 34 South., 968; *Railroad Co. v. Crenshaw*, 136 Ala., 573, 34 South., 913; *Bryant v. Railroad Co.*, 137 Ala., 488, 34 South., 562) as a series, and note the questions that were stated and discussed in them without being convinced that these cases were ordinary damage suits, brought to recover for a wrongful death inflicted by the defendant upon the intestate or testator of the plaintiff, and for the benefit of the estate of the person so killed; that the only difference, in respect of damages between these suits and others brought to recover for a wrongful death inflicted—as for example, for the death of an employee (for cases of this character, see *Railroad Co. v. Bridges*, 86 Ala., 449, 5 South., 864, 11 Am. St. Rep., 58; *Williams v. Railroad Co.*, 91 Ala., 635, 9 South., 77; *Railroad Co. v. Orr*, 91 Ala., 548, 8 South., 360; *Railroad Co. v. Mallette*, 92 Ala., 209, 9 South., 363; *James v. Railroad Co.*, 92 Ala., 231, 9 South., 335) resides in the facts that, while in the class of cases last referred to the jury are furnished by the court with rules of approximate certainty for measuring the damages, in cases arising under the statute sued on in the present case they are left somewhat at large, with no

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more certain guide than that they must consider all of the circumstances of the occurrence eventuating in the death complained of, for the purpose of ascertaining and determining the degree or extent of the negligence, if any, of the defendant, and upon such consideration they must assess damages to such amount or in such sum as to them may seem a just retribution for the injury in such manner inflicted, ranging from nominal damages upwards according to or proportioned to the degree of culpability; and, further, that the terms "mulct," and "punishment," and "fine," used in some of the decisions referred to, do not in these decisions, bear the meaning attached to them in the domain of criminal law, and were not intended to be so understood by the supreme court of Alabama.

Forcible confirmation of this conclusion is found in the language used by that court in *Railroad Co. v. Bush* supra, 122 Ala., 488, 489, 26 South., 173, 174.

In that case it appeared that the plaintiff below propounded to the defendant interrogatories for a discovery under the provisions of Code 1896 (Ala.) sections 1850-1858, answers to which were made by the engineer. When these answers were offered in evidence by the plaintiff, defendant objected to their introduction on the ground that defendant could not, in a proceeding of this character, be legally and constitutionally compelled to answer the interrogatories. The ground of objection offered by the defendant was that the action was

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penal in its nature, and that in such actions the defendant is protected both by the rules applicable to discoveries and by constitutional guaranty against any compulsory process to compel him to answer any questions the answers to which would have a tendency to incriminate him, or to expose him to a penalty or a forfeiture. After noting that the supreme court of the United States (*Counselman v. Hitchcock*, 142 U. S., 547, 12 Sup. Ct., 195, 35 L. Ed., 1110; *Boyd v. United States*, 116 U. S., 616, 6 Sup. Ct., 524, 29 L. Ed., 746), had held that proceedings for penalties and forfeitures were within the provisions of the fifth amendment to the federal constitution that no person shall be compelled in a criminal case to be a witness against himself, and that this provision was a protection against compulsory self-disclosure in any proceeding, civil or criminal, of matters tending to incriminate the witness, or to expose him to a penalty or forfeiture, the court proceeded:

"If the damages recoverable in an action of this character were, strictly speaking, a penalty imposed by law, we would be inclined to give to our constitutional provision on the subject the same construction that has been placed on the similar provision of the federal constitution, and to hold that the defendant could not be compelled, even by statute, to give or furnish evidence in aid of a recovery against it. But while the damages recoverable are undoubtedly, under our former rulings, punitive in their nature, and not compensatory, they are not, in a strict sense, a penalty; nor is the action penal,

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or quasi criminal, within the meaning of the constitutional provisions as above construed. The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before as to 'prevent homicides,' and the action given is purely civil in its nature for the redress of private, and not public, wrongs." The objection was accordingly overruled.

What is here said in the quotation just made is the logical result of all the preceding Alabama cases on the subject, when one goes to the very substance of them, disregarding mere formal expressions; and it is impossible, in the face of this decision, to hold that actions under the statute are penal in the international sense.

5. The action is not so repugnant to the public policy of our State as that we should, for that reason, decline to entertain it. The bringing and disposition of suits for damages caused by wrongful death is a matter of everyday occurrence in the courts of this State. And as said by Mr. Justice Brewer in *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S., 445, 448, 449, 18 Sup. Ct., 105, 106, 42 L. Ed., 537: "A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim '*Actio personalis moritur cum persona*,' damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the States in more or less conformity

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to what is known as 'Lord Campbell's Act' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. *Dennick v. Central Railroad Co.*, 103 U. S., 11, 26 L. Ed., 439. It may be well that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common-law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained where the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced"—citing *Texas & Pac. Ry. Co. v. Cox*, 145 U. S., 593, 12 Sup. Ct., 905, 36 L. Ed., 829; *Dennick v. Central Railroad Co.*, 103 U. S., 11, 26 L. Ed., 439; *Huntington v. Attrill*, *supra*; *Northern Pac. Ry. Co. v. Babcock*, 154 U. S., 190, 14 Sup. Ct., 978, 38 L. Ed., 958.

In the case last cited, the court, speaking through Mr. Justice White, quoted with approval the following

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language from *Herrick v. Minneapolis, etc., St. L. R. Co.*, 31 Minn., 11, 16 N. W., 413, 47 Am. Rep., 771, which we also adopt, viz.: "But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

6. Nor will the court decline to entertain the action because of dissimilarity between the provisions of the Alabama statute and those of our own upon the same subject.

As we understand the Alabama law, the statute sued on in this case covers all rights of action for damages on account of wrongful death except those wherein the representatives of an employee sue the employer who has caused his death; recovery for this latter class of damages falling under another statute. Of course, under a statute so broad many questions must arise, based upon the reciprocal relations, rights, and duties of the

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respective parties, which must be considered and disposed of in determining, in the first instance, the existence of a cause of action, and, secondly, the degree of negligence or culpability. The same, and even greater, diversity is discovered in the operation of our own statute, since it prescribes a remedy for all cases of wrongful death, without distinction in respect of the relations of the parties. And even a greater diversity is experienced by all courts in administering contracts both domestic and foreign. But it is not on these grounds that the able counsel of the defendant place their objection. The dissimilarity complained of, other than that already considered and disposed of, is in respect of the measure of damages. It is said that while, under our statute, the mental and physical suffering of the deceased, his loss of time, and expense on account of the injury, also evidence of age, physical condition, earning capacity, and expectation of life, may all be considered. Under the Alabama statute none of these are admissible, but the amount of damages is to be assessed upon a general and particular view of all of the circumstances attending the injury, and proportioned to the culpability disclosed upon a comparison of such facts and circumstances with the measure of duty imposed by law upon the defendant in the situation shown by the evidence; and the ascertainment of the breach of such duty, and the extent of it—in short, upon the degree of negligence proven in the cause—and that such sum is to be assessed.

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sed for this negligence a the jury may deem adequate punishment therefor.

We do not think that Tennessee courts and juries will find any more difficulty in administering this rule than is experienced by the tribunals of our sister State. It is quite as difficult (and more uncertain in results) to ascertain how much should be allowed in a given case for mental and physical suffering as to fix a sum that shall approximately measure in money the degree of culpability shown by a defendant guilty of negligence. Moreover, the tribunals of this State have long applied the substance of the Alabama rule in the reverse aspect in measuring the degree of culpability of a plaintiff whose contributory negligence, in a certain well-known class of cases in this State, does not bar the action, but only mitigates the damages. In this class of cases the juries are, in substance, instructed to consider and estimate the the degree and extent of the plaintiff's negligence, and to abate his recovery by such amount as they may deem just in view thereof.

7. We should add that we do not understand that under the Alabama statute the jury are left to unrestrained action in fixing the amount of the recovery, but that they are subject to the overruling discretion of the court, in case it should be of opinion that the amount found is so large as to evince passion, prejudice, or caprice; since it is laid down as a general principle (in *Furniture Co. v. Little*, 108 Ala., 339, 19 South., 443, and see *Railroad Co. v. Burgess*, 119 Ala., 555, 564, 565,

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25 South., 251, 72 Am. St. Rep., 943; *Railroad Co. v. Mallette*, 92 Ala., 209, 217, 218, 9 South., 363, 365, 366) that punitive damages are in the discretion of the jury, but only within "reasonable limits." At all events, the constitution of our own courts is such, and the relation between the court and the jury are of such a character, under our laws, that the trial judge has always, and this court on appeal always, the power to set aside verdicts on the ground above stated; and every cause of action to which the hospitality of our tribunals is extended must be understood as so qualified, inasmuch as we cannot alter the constitution of our courts for their entertainment.

It results that there is error in the action of the court below in dismissing the plaintiff's suit, and the cause is remanded for proper issue and further proceedings.

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STATE, *ex rel.* PETER HARRIS, *v.* W. A. HAMBY, *County Judge.*

114 361
117 398

[(Nashville. December Term, 1904.)]

1. **CONSTITUTIONAL LAW.** Statute redistricting Cumberland county contains but one subject, and is constitutional. The statute (Acts 1903, ch. 599) redistricting and reorganizing Cumberland county embraces but one subject and is constitutional and valid.

Act cited and construed: 1903, ch. 599.

Constitution cited and construed: Art. 2, sec. 17.

2. **SAME.** Provision against two subjects of legislation in a bill applies to the body of the statute, and not to its caption, when. The constitutional provision that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," does not apply, as to the one subject, to the title, but to the body of the bill, the effective and operative part of the statute—the law that is made; for it is no objection to the bill that the caption is broader than the enacting part, or covers or can be construed to cover other subjects, so that the real subject of legislation is therein expressed, and not obscured by the foreign matters. (*Post*, pp. 364, 365.)

Cases cited and approved: Powers v. McKenzie, 90 Tenn., 167; State v. Brewing Co., 104, Tenn., 723.

Constitution cited and construed: Art. 2, sec. 17.

3. **SAME.** Statute abolishing civil districts operates to abolish offices dependent upon the districts for their existence and ends official life of incumbents. A statute abolishing the civil districts of a county operates as an inevitable legal consequence to destroy all offices of justices of the peace, constables, and tax assessors therein, which are

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absolutely dependent upon the district for their existence, and the official life of the incumbents is immediately ended, in the absence of a saving clause. (*Post*, pp. 365-367.)

Cases cited and approved: *State v. Gaines*, 2 Lea, 316; *Judges' Cases*, 102 Tenn., 509; *State v. Lindsay*, 103 Tenn., 625; *Grain-ger Co. v. State*, 111 Tenn., 234; *State v. Akin*, 112 Tenn., 603.

FROM CUMBERLAND.

Appeal from the Chancery Court of Cumberland County.—HUGH G. KYLE, Chancellor.

O. E. SNODGRASS, for complainant.

SMITH & SMITH and L. V. HAMBY, for defendant.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This suit is brought by Peter Harris, a former justice of the peace of Cumberland county, against W. A. Hamby, judge of the county court of that county, and involves the constitutionality of an act of the general assembly passed April 1, 1903 (Laws 1903, p. 1563, c. 599) for the purpose of redistricting Cumberland county, the effect of which was to deprive complainant of his office.

The statute is as follows:

“An act to create and establish four civil districts in

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the county of Cumberland in lieu of the thirteen civil districts, now existing; to define the boundaries of the same, and to abolish certain offices in said county and to provide for the election of their successors.

"Section 1.—Be it enacted by the general assembly of the State of Tennessee, that, there are hereby created and established for the county of Cumberland, four civil districts in lieu of the thirteen civil districts now existing therein.

"Section 2.—Be it further enacted, that, the boundaries of said new civil districts shall be as follows: Boundaries of the second and fifth civil districts shall be consolidated and shall hereafter be known as the first civil district.

"Second, the territory now embraced within the boundaries of the first, sixth and thirteenth civil districts shall be consolidated and shall hereafter be known as the second civil district.

"Third, that the territory now embraced within the boundaries of the third, fourth, eighth and eleventh civil districts shall be consolidated and shall hereafter be known as the third civil district.

"Fourth, that the territory now embraced in the seventh, ninth, tenth and twelfth civil districts shall be combined and shall hereafter be known as the fourth civil district.

"Section 3.—Be it further enacted, that, all the various district officers, to wit, justices of the peace, constables and tax assessors, now holding offices in said

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county, are hereby abolished, and the county board of election commissioners shall call an election to be held, according to law for the election of two justices of the peace, one constable and one tax assessor, in all the new districts created, except in the first wherein shall be elected three justices. Said election shall be opened and held at the various voting precincts, in said county on the 7th day of May, 1903, and the present district officers in said county shall hold their offices until the officers herein provided for have been elected and qualified.

“Section 4.—Be it further enacted, that, the voting precincts in the various civil districts in said county shall remain as they now stand.

“Section 5.—Be it further enacted, that, this act take effect from and after the 7th day of May, 1903, the public welfare requiring it.”

The objection now made to this act is that both the title and the body of it embrace two subjects, viz., redistricting Cumberland county and the abolition of certain offices in that county, and that in this it contravenes article 2, section 17, of the constitution, providing that “no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.”

This contention cannot be sustained. We do not think that either the title or the body of this statute embraces two subjects. If the title did—and complainant seems to press this point with more confidence against it than the body of the act—it would be immaterial. The con-

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stitutional provision invoked does not apply to the title, but to the body of the bill, the effective operative part of the statute—the law that is made. It is no objection to a bill that the caption is broader than the enacting part, or covers or can be construed to cover other subjects so that the real subject of legislation is therein expressed and not obscured by the foreign matters. *State v. Schlitz Brewing Co.*, 104 Tenn., 723, 59 S. W., 1033, 78 Am. St. Rep., 941; *Powers v. McKenzie*, 90 Tenn., 167, 16 S. W., 559.

But neither the bill nor caption embrace two subjects.

The purpose and object of the statute is to redistrict and reorganize Cumberland county. The first section abolishes all the old districts and creates four new ones, and the second defines their boundaries.

The inevitable legal consequence of abolishing the old districts was the destruction of all the offices of justices of the peace, constable, and tax assessor in them. These offices were absolutely dependent upon the districts for their existence, and when the districts were abolished they were, by operation of the law, destroyed. *Grainger County v. State*, 111 Tenn., 234, 80 S. W., 756-763.

There can be no officer without an office to be filled; and when the offices of justice of the peace, constable, and tax assessor of the old districts ceased to exist the official life of the complainant and the other officers of those districts terminated. *State v. Gaines*, 2 Lea, 316; *State v. Lindsay*, 103 Tenn., 625, 53 S. W., 950; *Judges' Cases*, 102 Tenn., 509, 53 S. W., 134.

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That portion of the third section of the act abolishing the offices or officers, and its proper meaning may be, was therefore nothing more than declaratory of the meaning and effect of the first section, and cannot be said to be incongruous, but is clearly germane to it. It is not in any sense a separate or distinct subject.

The chief attack evidently intended to be made and urged against the constitutionality of this statute when this bill was filed was that the complainant and other district officers of the county could not be deprived of their offices before the expiration of the constitutional terms for which they were elected indirectly by abolishing their districts, but it is now conceded that since then this question has been decided adversely to this contention in the cases of *Grainger County v. State*, 111 Tenn., 234, 80 S. W., 750, and *State v. Akin*, 112 Tenn., 603, 79 S. W., 805.

It is held, in effect, in these cases, that the general assembly, in the exercise of its power over the affairs of counties and municipalities, may abolish existing civil districts of counties and create others at will, and that when a district is abolished all the offices for it cease to exist with it; and the official life of those holding them is immediately ended, in the absence of a saving clause like that contained in this statute, providing that they shall hold their offices until others for the new districts are elected and qualified.

This statute seems to be without constitutional objection, and valid and effective to abolish all the civil

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districts of Cumberland county existing when it was enacted; the result of which was to destroy the offices of justice of the peace, constable, and tax assessor in those districts; and, consequently the complainant ceased to be a justice of the peace May 7, 1903, when the act took effect, and is not entitled to any relief under his bill.

The decree of the chancellor and the court of chancery appeals so adjudging is affirmed.

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114 368
117 232

LOUISVILLE & NASHVILLE TERMINAL COMPANY *et al.* v.
JOHN T. LELLYETT.

(Nashville. December Term, 1904.)

1. **VARIANCE.** None between allegations and proof where writ shows plaintiff sues as trustee and next friend for beneficiaries though declaration is in his own name, and proof shows title in him for the beneficiaries.

The holder of the legal title to land as trustee for the beneficial owners may, as their trustees and next friend, sue to recover damages to the use of their land, health and comfort caused by defendant's improper use and maintenance of railroad and terminal yards, roundhouses, and other accessories in and near the same; and where the writ or summons shows that the suit is by him as trustee and next friend for the named beneficial owners, and the averments in the declaration are in his own name without more, and the proof shows the title to the land to be in him for their use and benefit, there is no fatal variance between the allegation and proof, for it sufficiently appears from the writ and declaration that the plaintiff was trustee for the named beneficial owners, and that the suit was brought for damages to the use of their property, health and comfort. (*Post*, pp. 372, 373, 384.)

2. **MISJOINDER OF ACTIONS.** Obviated by abandonment of the claim constituting the misjoinder.

Misjoinder of cause of action may be obviated by abandonment or withdrawal of the claim that constitutes the misjoinder, with proper instructions to the jury, and its omission as one of the elements of recovery or damages in the charge of the trial judge. (*Post*, p. 385.)

3. **SAME.** None in action for injury to use of land by allegation of impairment to health of plaintiff's family as a specification of damages done to land as a home.

Where, in an action for injuries to the use of certain real estate caused by defendant's improper maintenance and use of rail-

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road and terminal yards, there is no claim for damages for sickness, doctor's bills, etc., and an allegation in the declaration of impairment of the health of plaintiff's family is merely a specification of damages done to the land as a home or place of residence, just as in the destruction of the grass, trees, shrubbery, etc., and the presence of smoke, cinders, etc., the declaration is not objectionable for misjoinder of causes of action, for there is no separate cause of action in favor of the plaintiff's wife and children for injuries to their health. (*Post*, pp. 385, 386.)

4. **PLEADING AND PRACTICE.** Count for injuries to fee as distinguished from recurrent injuries eliminated by charge of court.

Where, in an action by an adjacent landowner for injuries to his land resulting from the defendant's improper operation of railroad and terminal yards, the court, at plaintiff's request or on its own motion, charged that plaintiff could not recover for injuries to the fee and that the proof of the value of the premises must be considered only in determining the question whether the comfortable enjoyment of the premises had been impaired or destroyed, such instruction eliminated counts or causes of action alleged for the recovery of permanent as distinguished from recurrent damages. (*Post*, pp. 386, 387.)

5. **RAILROAD AND TERMINAL CORPORATIONS.** Location and operation cannot be authorized with immunity from damages for injuries to adjacent property.

Railroad and terminal corporations cannot be authorized, under their charters nor by law, seriously to impair or destroy adjacent property by the location and operation of terminal yards, roundhouses, coal chutes, etc., with immunity from damages for injury to adjacent property resulting from such location and operation of their terminal yards. (*Post*, pp. 388-400, and especially 391.)

Cases cited and approved: *Telegraph and Telephone Co. v. Jacobs*, 109 Tenn., 727, 741, 743; *Madison v. Copper Co.*, 5 Cates, 114 Tenn.—24

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- 331, 342, 343; and numerous cases in other States and countries cited in the opinion on pages 392-399.

6. SAME. No damages for injuries from increased railroad traffic, but damages from operation of railroad terminal yards and accessories, when.

In an action to recover damages for injury to adjacent property by the operation of railroad and terminal yards, the plaintiff is not entitled to recover damages incident to the increase of traffic into and through the station over tracks laid fifty years ago, when his property was vacant, or over other tracks subsequently laid as the traffic increased and required them, but may recover damages for injuries resulting to his property from the operation of terminal yards, roundhouses, coal chutes, etc., and the switch yards and tracks necessary to operate them, where the railroad terminal corporation was organized and the terminal yards and facilities were constructed after the erection of plaintiff's house. (*Post*, pp. 400, 401.)

7. DAMAGES. For injury to property from operation of public or quasi public enterprises, when and when not.

The law does not allow damages for annoyances and discomforts resulting from the operation of public or quasi public enterprises, unless they go to such an extent as to injure the usable and rental or permanent value of the property, for they must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof. (*Post*, pp. 401-403.)

Cases cited and approved: *Railroad v. Bingham*, 87 Tenn., 522; *Demarest v. Hardham*, 34 N. J. Eq., 469.

8. SAME. Measure of damages for injury to real estate is its diminished rental value, when.

Where railroad terminal yards are operated so carelessly and negligently as to create a nuisance to plaintiff's adjacent property, which might be avoided and obviated by adopting other means and being more careful in the manner of operating the

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yards, the measure of damages is the injury to the value of the use and enjoyment of the property, measured largely by the diminished value of the property. (*Post*, pp. 403, 404.)

9. **SAME.** Measure of damages for injury to real estate from operation of railroad terminal yards is the injury to the permanent value, when.

In an action for injury to adjacent property, caused by the operation of railroad terminal yards, where such yards are carefully and properly operated, plaintiff's measure of damages is the injury to the fee and permanent value of the property by the permanent operation of such terminal yards. (*Post*, pp. 404, 405.)

10. **VERDICTS.** Set aside for excessiveness of damages; case in judgment.

Where in an action for damages for injury to the use and enjoyment of plaintiff's property, by the operation of railroad terminal yards, a verdict awarding plaintiff four thousand dollars damages for such injury for a period of thirty-two months, where the property is worth only seven thousand dollars, is so grossly excessive as to indicate either misapprehension by the jury, or passion, prejudice, or caprice on their part, and will, therefore, be set aside. (*Post*, pp. 405-407.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.—
J. A. CARTWRIGHT, Judge.

JAMES C. BRADFORD, BAXTER SMITH, PERCY D. MADDIN, SLEMONS & BARTHELL, JOHN B. KEEBLE and CLAUDE WALLER, for Terminal Company and Railroads.

WALTER STOKES and GEORGE A. FRAZER, for Lellyett.

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MR. JUSTICE WILKES delivered the opinion of the Court.

This is an appeal in the nature of a writ of error from a judgment against the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Terminal Company for \$4,000 for alleged injuries from smoke, soot, dust, and noise claimed to be due to the operation of the railroad and terminal yards, roundhouses, etc., at Nashville, Tennessee.

The cause was tried before the Honorable J. A. Cartwright, circuit judge, and a jury. A motion for a new trial was duly made and overruled. A motion in arrest of judgment was then made and overruled. Due and proper exception was taken to the action of the court, and an appeal was prayed to this court.

The writ was issued on August 25, 1902, and required the defendants "to answer John T. Lellyett, trustee, and next friend of Mary R., Mary Frances, and Catherine Lellyett in an action for damages in the sum of ten thousand dollars."

The declaration contains six counts.

The first count alleges that when "he (the plaintiff) became the owner of said property, and up to the time of the location of the terminal station and occupation thereof by defendants, said property was exceedingly valuable; the neighborhood was quiet, free from noise, smoke, and soot, and unpleasant gases, and in every way a desirable place to reside; that, owing to its loca-

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tion aforesaid, and its freedom at the time from noise, dust, soot, and noxious gases, plaintiff had beautified said place with shrubbery, trees, grass, and flowers, which would enhance the value of aforesaid property intended for residence purposes."

The declaration then proceeds to state that the terminal company was chartered and authorized to erect a terminal station in Nashville, and did erect the same; that afterwards, under some arrangement with the defendant companies, they have been in the use, operation and occupation of the same; that the terminal yards or grounds lie in close proximity to the plaintiff's property, and defendants have constructed large numbers of tracks thereon, and operate a large number of engines and cars over them; that the noise from the engines and cars is unreasonable and constant day and night; that the defendant companies use a cheap and low grade of soft coal in their engines which emit volumes of black dirty smoke, defiling everything with which it comes in contact, which is due to the negligence of defendants in the operation of their engines; that the engines emit poisonous and noxious gases, which often lie over plaintiff's property like a pall; that defendants negligently erected in close proximity to plaintiff's property large coal bins or chutes, upon which thousands of cars of coal are dumped from a high elevation, causing dust and dirt to arise therefrom, which pass over and settle on plaintiff's property; that defendants have erected a large roundhouse, with a number of pipes or smoke-

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stacks, where they fire up and cool off engines, some of which are permitted to remain in said house an unreasonable length of time, and from the smokestacks of which roundhouse the smoke passes over to and settles on the plaintiff's property; that plaintiff's property is not worth near as much as it was before the erection of said depot and terminal station, and said decrease has been owing to the wrongful acts of defendants; that said smoke, soot, creosote, cinders, dust and gases have permanently reduced and injured the value of plaintiff's realty, and have destroyed plaintiff's shrubbery, trees, grass and flowers; and that plaintiff has been damaged the sum of \$10,000.

The second count is substantially the same as the first, except that it alleges damage to "his household furniture, ornaments, silver, and such articles," and that the smoke settles upon plaintiff's house and injures his personal property.

The third count alleges the same as the first count, but the damage claimed is for injury to the health of his family.

The fourth count alleges the same facts, and the damages claimed are for permanent injury to the property.

The fifth count alleges the same facts, and avers damages as follows: "Thereby damaging and injuring the furniture, hangings, fixtures, carpets, and property of the plaintiff and his family, ruining and destroying its use by the plaintiff and his family, to his damage ten thousand dollars."

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The sixth count alleges similar facts, and claims damages as follows: "And that their result is to destroy the health, peace, comfort, and happiness of his family, and that their peace, health, comfort, and happiness have been injured and destroyed by said reckless, careless, negligent, and willful conduct, to the extent of ten thousand dollars."

The defendants demurred on three grounds:

First. Because of misjoinder of parties and misjoinder of causes of action, in that the suit was for damages for permanent reduction of the value of the property and for damage to the household furniture, and that the smoke and soot had been carried into the systems of the plaintiff and his family, whereby their health was greatly injured; that the plaintiff, as trustee and next friend, cannot sue for injury to the real estate in the same action in which he sues for injury to the health of the parties for whom he is trustee and next friend; that the plaintiff's ownership of the property is joint, and the injury to the health of the plaintiff's is several.

Second. That the declaration is insufficient in law, because it is uncertain, indefinite, and ambiguous.

Third. For misjoinder in causes of action in suing for permanent decrease in the value of real estate, and also for injury to personal property, household furniture, and for loss of personal comfort and of health.

Identical demurrers were filed by all the defendants.

The court sustained the demurrers as to the claim

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for damages to the plaintiff, John T. Lellyett, individually. In all other respects the demurrers were overruled, to which due exception was taken.

The defendants filed pleas raising the same questions.

The defendant's first plea was the general issue—not guilty.

The second plea was a special plea in which the defendant companies' charters were averred. The plea then further alleged that, when the company's road was first built, Nashville was a village with few inhabitants; that the property on which plaintiff's residence is now situated was vacant; that defendant's shops and terminal facilities were located at the extreme western edge of the town, and that the only feasible location for them was there; that they continued to operate said shops and terminal facilities at such point until the town increased in size, and there was an absolute necessity for larger shops, depots, bigger grounds and terminal facilities, and for new depots for passengers and freight; that, pursuant to this demand, the city of Nashville, a number of years ago, authorized the closing up of certain streets and alleys, and later on the raising of certain streets and the building of certain overhead bridges; that the city itself spent large sums of money in making these improvements; that, in order to furnish a suitable depot and terminal facilities, the railroads entering Nashville co-operated; that the public business increased, and thus increased the operations in the terminal yards; that the erections complained of

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were built pursuant to lawful powers, and that the damages complained of are such as are suffered by all persons who live in a city which grows and expands, and who happen to reside near any coal-burning concern that cannot move from place to place; that the location was determined by public necessity and convenience and the demands of commerce, as well as by charter rights; and that the original road was built long before plaintiff's residence was erected, and the proximity of its depots and yards to plaintiff's house has come about by reason of necessary expansion in serving the public.

The third plea was that the topography of the city of Nashville rendered any other location impracticable.

The fourth plea was based upon the public convenience and public necessity for locating the terminal facilities within reasonable reach of the public.

The fifth plea recited the charter of the Nashville & Chattanooga Railroad, and the original location of its road where the present tracks are situated; the original charter of the Louisville & Nashville Railroad Company; the construction of its railroad into Tennessee; its extension from its original depot, on the west bank of the Cumberland river, through the territory now occupied, and past plaintiff's residence; the original charter of the Tennessee & Alabama Railroad, the Nashville & Northwestern Railroad, the Nashville & Decatur Railroad, and other lines extending into Nashville, and their ultimate connections through Nashville and along the tracks now used for terminal purposes near plain-

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tiff's residence; the charter of the Louisville & Nashville Terminal Company, and its construction of the terminal facilities, and its lease to the two railroads. The plea further averred that the present terminal facilities were built in order to serve the public and to meet a public demand, and that they are operated solely by the railroad companies, and not by the terminal company; that in said operations said companies used machinery and engines manned by suitable, competent, and skilled employees, and burn the same coal which has been used by railroads in this section since long before the plaintiff became the owner of the property which he claims is injured; that soft coal is the only practicable fuel in the South, and that defendants make no more smoke, noise, dust, ashes, etc., than arise from a reasonably skillful and careful operation of their business; that plaintiff acquired the same property, for the alleged injury of which damages are claimed, when defendants were already operating many engines and trains, and doing a large amount of switching upon their own premises in the necessary transaction of their business, and that the additional smoke, etc., is due to the increased traffic rendered necessary by service to the public; that the location of the yards and terminal facilities was the most reasonable and practicable location to be found, considering the necessities of the public as well as the railroad companies; that defendants rely upon their charter rights for locating and operating their depots, roundhouses, shops, and other terminal facili-

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ties, and for operating and running trains in said yards.

The defendants also filed pleas of the statute of limitations of one and three years.

They also filed a plea known in this record as the "John Doe Plea," which is that this property and the plaintiff's property were originally owned by one John Doe, who, for a consideration, conveyed the property now owned by the railroad companies, and over which these operations are had, to the railroad companies, etc. But no proof was introduced under this plea, and it was stricken out.

Plaintiff joined issue on all the pleas except the last named.

The evidence on behalf of the plaintiff tended to show that, at the time he acquired this property, Gowdy street was a quite street, suited for residence purposes; that there was no unusual noise, and no unusual amount of dust, dirt, and cinders; and that it was a comfortable place to live.

That the coal chutes complained of are used for dumping coal from cars into bins, to be used in firing engines; that the cars are hauled up on an inclined trestle, from which the dumping is done.

That the roundhouse had some ten or twelve stacks, running up about forty feet into the air.

That there is a sand or dry house in the yards; that in the terminal operations, trains are made up in the yards, and the switching and operations of engines and

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cars are practically constant; that coal is dumped day and night and on Sunday.

That the switch engines move forward and backward continually, and frequently stop opposite plaintiff's house, and the noise and smoke from them come directly to his house.

That the first discomfort he experienced on account of the smoke, noise, etc., was after the terminal yard opened.

That his family consists of his wife and three children, and they suffer from these discomforts proceeding from the terminal yards.

That as many as twelve or fifteen engines can be seen in the yards at one time, and, when the smoke from these comes over his premises, he can smell it. Sometimes it is impregnated with gas and causes coughing. In the summer time the front windows of his house cannot be opened for any length of time without experiencing trouble from cinders, soot, and smoke.

The furnishings in the house belong to his wife, and he holds the house as trustee for his wife and children, under a deed to him from his mother. He valued the entire property at \$7,000 and furniture at \$1,500.

There was evidence tending to show that the grass, trees, shrubbery, and flowers in the vicinity died, and that the smoke, soot, and noises were unpleasant, and they disturbed the sleep of himself and family, and damaged both the house and the its furniture and furnish-

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ings; that there was considerable noise from the ringing of engine bells, but the whistle was seldom blown.

That the plaintiff has been in the habit of taking his family to the country in the summer, leaving the city the 1st of June, and remaining away until in September.

That the noises from the terminal yards had a tendency to disturb the nervous system, and were disturbing to visitors, but one would get accustomed to it, though at the expense of nervous force.

The defendants introduced in evidence the charters of the several railroads composing the lines using these yards for terminal purposes, and also the charter of the Louisville & Nashville Terminal Company, which constructed the yards and leased them to the two railroad companies, together with the lease itself, the ordinance of the city of Nashville, and the contract between the city and the terminal company for the construction and operation of the yards.

It is not necessary to refer to these charters, leases, consolidations, and connections more in detail.

Owing to the immense growth in travel and traffic, it was deemed advisable and necessary, for the benefit and convenience of the public, to provide new and enlarged terminal facilities at Nashville; and a lot was selected, centrally and conveniently located on Broad street and embracing something like 100 acres, upon which was erected a passenger station house and a roundhouse, and coal chutes and bins, and a sandhouse,

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and a large number of tracks, used for switching and other purposes. This was in 1900.

Engines and cars have been operated since 1851 within 225 feet of the front of Mr. Lelleyett's house, upon tracks that still are used, and are a part of the terminal facilities.

None of the tracks or houses erected under the terminal station plant are nearer to Mr. Lelleyett's house than these original tracks; the new and additional tracks being to the west of the original tracks, and further removed from Mr. Lelleyett's location.

On the west side of Gowdy street, opposite Mr. Lelleyett's house, and between it and the terminal yards, are a number of houses, almost every lot being built upon, so that the smoke, dust, cinders, and noise must pass over these before reaching him.

From Mr. Lelleyett's house to the nearest point of the roundhouse is 750 feet; to the center of the roundhouse, 950 feet; and to the most distant wall of the roundhouse is 1,100 feet.

From Mr. Lelleyett's house to the nearest point of the coal chutes on Kayne avenue was 700 feet, and the further end of the coal chutes 800 feet.

From his house to the coal bins on Gleaves street, at the nearest point, was 1,150 feet, while the farthest point was over 1,200.

From his house to the sandhouse was between 1,100 and 1,200 feet.

The yard space between his house and these sand-

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houses and coal chutes is occupied by tracks used for incoming and outgoing trains, and for switching and yard purposes.

Defendants' evidence also showed that there were operated in the terminal yards seventeen engines in the daytime, and ten of these engines at night. Only three or four of these engines, however, operated continually in that part of the yard opposite Gowdy street, the balance of them, being assigned to different locations—some working in South Nashville, some in West Nashville or New Town, some in East Nashville, and others north of the Broad Street Viaduct—would only come into the terminal yards for a little while at a time, and at perhaps long intervals.

These three or four engines which worked opposite Gowdy street, and consequently opposite Mr. Lellyett's house, were engaged mostly in hauling passenger trains. They used about 400 to 500 bushels of coal, in all, in twenty-four hours.

The evidence showed that the terminal yards began operations in January or February, 1900. This suit was brought August 25, 1902, about thirty-two months after the terminals began operations.

During this time, according to Mr. Lellyett's evidence, he had been absent from the city, with his family, from the middle of June to about the middle of September each summer. Deducting these periods of time he was away, it would appear that he and his family were in their residence about twenty-four months.

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The case was submitted to the jury under a charge of the court, and a verdict was rendered against the defendants for \$4,000. Under this charge, no damages were awarded for injuries to the fee, and all damages to the furniture were, at plaintiff's request, withdrawn. Hence this verdict must be taken as damage to the value of the use of the property, and other elements alleged in the declaration.

The defendants have appealed to this court, and assigned errors—twenty-nine in number.

The first error assigned is that there is no evidence to support the verdict.

Under this assignment it is insisted that the suit is brought in the name of Jno. T. Lelleyett, trustee and next friend for Mary R., Mary Frances, and Catherine Lelleyett; while there is nothing in the several counts and allegations to indicate that the suit is brought for the use and benefit of any one, except Jno. T. Lelleyett, individually, and that the word, "trustee," annexed to his name, is merely *descriptio personae*; while the proof shows that the title to the property is in Jno. T. Lelleyett, trustee, for the use and benefit of his wife and two children, the parties named in the summons; and hence there is a variance between the allegations and proof of title, which is fatal to the action.

We think this objection not well taken, and that it sufficiently appears that Mr. Lelleyett was trustee for his wife and children, and the suit was brought for damages to the use of their property, health, and comfort.

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The second assignment of error is that there is a misjoinder of parties and causes of action.

The insistence is that there are five distinct and separate causes of action stated in the declaration, to wit:

First, a joint cause of action for damages to the real estate.

Second, a separate cause of action to Jno. T. Lellyett for damages to his furniture.

Third, fourth, and fifth, separate causes of action in favor of the wife and two children for injury to their health.

In regard to this assignment, it is only necessary to say that all claim for damages to personal property of Jno. T. Lellyett was abandoned, and the jury was so instructed, and this was not embraced as one of the elements of damages in the charge of the trial judge.

As to what are styled the third, fourth, and fifth causes of action, we think the assignment and criticism made is not well founded. There is no claim for damages for sickness, doctor's bill, etc. The allegation of impairment to health of family is merely a specification of the damage done the place as a home or place of residence, just as is the destruction of the grass, trees, shrubbery, etc., and the presence of smoke, cinders, etc.

In other words, the averment is directed to the damage to the use of the property, and this damage consists in its being rendered unhealthy, uncomfortable, and unsuitable for residence purposes.

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In the charge of the court the jury were not instructed to give any damages for sickness or impairment of health of any of the family, but it was omitted, and the jury could not have given any damages for sickness or impairment of health, separate and apart from the damage done the property as a comfortable, healthy, and suitable place of residence.

The damages for which recovery was directed to be given by the charge was "to the use, comfort, peace, quiet, and enjoyment of the house and lot," and health and sickness are not referred to in that part of the charge relating to the measure of damages.

We think, therefore, that there was no separate cause of action recovered upon for sickness or impairment of health.

We think it well to analyze the pleadings and see what issues are properly before us, and see whether there were issues submitted to the jury which were not warranted under the pleadings.

The first count in the declaration sues for permanent injury and impairment to the value of the premises of complainant.

So, with the fourth count, the damage claimed is to the permanent injury to the property.

Now, the court charged the jury, at plaintiff's request, that the plaintiff could not recover for the injury done the fee of the premises, and any proof adduced as to the value of the premises, if such there be, must be considered only determining the question as to whether

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or not the comfortable use and enjoyment of the premises had been impaired or destroyed.

This instruction by the trial judge was made at the request of the plaintiff, but really it is immaterial whether the charge was given at plaintiff's request or on motion of the court.

This instruction eliminates the first and fourth counts, since they claim for permanent, and not recurrent, damages.

These two counts must be eliminated, therefore from our consideration, as not presenting the issues upon which the case was tried and damages found.

The second and fifth counts are for damages to the furniture and fixtures in the house, and these are eliminated because all claim for damages on this account was withdrawn by the plaintiff.

This leaves only the third and sixth counts not eliminated, and these counts claim damages for injury to the use and enjoyment of the premises as a home.

The third count states the wrongful act to be that the plaintiff's place has been changed from a quiet, restful home into an unhealthy, noisy, dirty, filthy place, which has greatly injured the health of plaintiff's family; and the sixth count states the wrongful act to be the injury and destruction of the health, peace, comfort, and happiness of the family; and upon these counts the verdict must be sustained, if at all.

The question before us is, therefore whether the use and enjoyment of the property of plaintiff has been ma-

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terially impaired by the acts of defendants, and if so, are the defendants liable therefor?

There can be no question but that some detriment has been done to the use and enjoyment of the property. The evidence in the record leaves no ground for doubt as to this feature, but to what extent, we will consider more at length.

Defendants do not seriously contend that they are not the parties who have caused this damage, but the contention is that they are not liable for the same.

The argument is that the defendants have authority under their charters to locate the terminal yards, round-house, etc., where they have placed them, and, while the exact location of these things is not prescribed by the charter, the defendants had the legislative discretion to locate them where it would be most convenient to them and the traveling public.

Concede, for the sake of argument, that this is true (and within certain limitations it is), still the question remains, if such location results in material damage to adjacent or contiguous owners, are the defendant liable? And this proposition presents the real controversy so far as the merits are concerned.

While there are many criticisms of the charge so far as it relates to this question, they are crystallized in the exception to the following part of the charge:

"I instruct you that it is no defense to this action to prove that the yards where the business of defendants is carried on is at a suitable locality, or that the busi-

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ness is a lawful business and one useful to the public, or that the best and most approved appliances and methods are used in the conduct and management of the business. Where a trade or business is carried on in such manner as to interfere with the reasonable and comfortable enjoyment of another of his property, or which occasions material injury to the property itself, it amounts to a wrong to the neighbor, and one for which an action will lie."

This portion of the charge is taken from the opinion of the court of chancery appeals in the case of *Ducktown, etc., v. Barnes*, 60 S. W., 600, which was, as to its result, approved by this court, and to some extent followed in the case of *Swain v. Tenn. Copper Co.*, 111 Tenn., 437, 78 S. W., 93.

As further bearing directly upon the question of liability, and meeting the criticism of defendant's counsel, the court charged:

"I charge you, gentlemen, that, under the charter of the defendants and the contract with the city of Nashville, the State has not authorized the wrong complained of. In locating the yards and the various structures thereon so that injury necessarily resulted to adjacent landowners, the defendants acted at their peril. In locating the terminal yards the defendants stood on the footing of an individual, and were entitled to no superior rights of immunity by legislative authority. The authority to construct the yards did not authorize defendants to place them wherever they might think pro-

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per in the city, without reference to the property rights of others. Defendants have no right to use the yards in disregard of the rights of others, and with immunity for their invasion.

"If you find from the evidence that the terminal yards are located in or adjacent to a residence neighborhood, and that in their operation the defendants make noises which, because of their volume, character, proximity, or unreasonableness, cause plaintiff material distress, discomfort, or injury, then, in that case, the defendants are liable. It is no defense that such noises are necessary to the operation of defendants' business, its location, manner in which it is conducted, the hours of its operation, character and volume of the noises, reasonableness or unreasonableness of the hours during which such noises are made, and all other attendant circumstances.

"I further charge you and instruct you, gentlemen, that neither is it any defense that when the nuisance was established it was in a convenient place, and that the public had come to the nuisance either by the extension of the town or the operating of highways and streets.

"The fact that the business was originally established in a convenient place, but that the public has come to it, is no defense."

The legislature may authorize public corporations and quasi public corporations to take private property for public use.

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Thus, it may authorize a railroad to take private property for its right of way, for its depots and station houses.

It may also authorize terminal companies to take private property for its station houses, roundhouses, coal chutes, and other necessary conveniences; but it cannot authorize such public corporations, in locating such works, to seriously impair or destroy property not so taken, but which becomes impaired or is destroyed by the use of that which is taken.

There is no authority for the commission of a nuisance, or the doing of a hurtful act, to adjacent or contiguous property, in order to operate that which it lawfully has.

This question, we think, has already been decided in this State in a number of cases.

In *Terminal Company v. Jacobs*, 109 Tenn., 741, 72 S. W., 957, 61 L. R. A., 188, which involved the location and construction of a roundhouse by this same terminal company, it is said:

"To claim exemption from a liability resting on a charter right, the answer may be properly made that the State has not authorized the wrong complained of, and, in locating its roundhouse so that the injury necessarily resulted to the adjacent landowner, it did so at its peril."

It appears to be the English doctrine that Parliament may authorize the construction of such a work at a specified place where its use would constitute a

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nuisance at common law, and no compensation could be claimed in respect to an injury to private rights, apart from a negligent use.

But, even under the English system, no such immunity could be claimed, unless there was sanction to do so, either expressed or implied.

As is said in *Hill v. Managers of the Metropolitan Asylum Dist.*, L. R., 4 Queen's Bench Div., 433:

"When the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that the discretion be exercised in strict conformity with private rights, and did not intend to confer license to commit a nuisance in any place which might be selected for the purpose."

This court, approving this doctrine, said, in addition, in *Terminal Company v. Jacobs*, 109 Tenn., 743, 72 S. W., 957, 61 L. R. A., 188:

"But over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use. This is the view taken in *Baseman v. Penn. R. R. Co.*, (N. J. Sup.), 13 Atl., 167. It is there said: 'A railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity. Such location is a matter of indifference to the public. Consequently,

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with respect to such act, the corporation stood on the footing of an individual, and was entitled to no superior rights of immunity. . . The authority to construct such works did not authorize it to place them wherever it might think proper in the city, without reference to the property rights of others. Grants of power to corporate bodies like these can give no license to use them in disregard of the rights of others, and with immunity for their invasion.' To the like effect is the leading case of *B. & P. R. R. v. Fifth Baptist Church*, 108 U. S., 317, 2 Sup. Ct., 719, 27 L. Ed., 739; *Cogswell v. N. Y., H. & H. R. Co.*, 103 N. Y., 10, 8 N. E., 537, 57 Am. Rep., 701."

The *Fifth Baptist Church* case, which is a leading case upon this question, has been cited and approved in a large number of cases, and by all the text-books and compilations, since it was delivered in 1883.

It is said that it is weakened in the case of *London Railway Company v. Truman*, 11 App. Cas., 50, but we do not find this to be so; but that case, by the opinion of the court itself, is differentiated from the *Hill* case and the *Church* case, the *Truman* case resting upon the English railway acts, which were assumed to establish the proposition that a railway might be made and used, whether it was a nuisance or not.

The *Truman* case is contrary to the other cases, because it is based upon the authority of the English railway acts, which authorize the construction and operation of the railway, even though it be a nuisance. No

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such legislation has ever been attempted in the United States, and it is so utterly repugnant to our constitution and system of government, by which the rights of every individual are protected, that it will never be attempted or upheld.

In the *Fifth Baptist Church Case*, 108 U. S., 317, 2 Sup. Ct., 719, 27 L. Ed., 739, it is said:

"It is no answer to the action of the plaintiff that the railroad company was authorized by act of congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient, that they are skillfully constructed, that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

"In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the president's house or of the capitol, or in the most densely populated locality. Indeed, the corpora-

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tion does assert a right to place its works upon property it may acquire anywhere in the city."

"Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others of their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." 108 U. S., 317, 2 Sup. Ct., 727, 27 L. Ed., 744.

And again, page 745 of 27 L. Ed., page 729 of 2 Sup. Ct., 108 U. S., 317:

"The acts that a legislature may authorize, which without such authorization would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest, and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

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And again, page 745 of 27 L. Ed., page 730 of 2 Sup. Ct., 108 U. S., 317:

"If, as asserted by the defendant, the noise, smoke, and odors which are the cause of the discomfort and annoyance to the plaintiff are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of, and, if that be not possible, they should be removed to some other place, where by their use the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes."

To the same effect is the case of *Chicago, Gr. W. R. Co. v. Methodist Church*, 102 Fed., 85, 42 C. C. A., 178, 50 L. R. A., 488, citing *Stevens v. New York Elev. R. Co.*, 8 N. Y. Supp., 313; *Lahr v. Metropolitan Eve. R. Co.*, 104 N. Y., 268, 10 N. E., 528; *Kane v. New York Elev. R. Co.*, 125 N. Y., 186, 26 N. E., 278, 11 L. R. A., 640; *Drucker v. Manhattan R. Co.*, 106 N. Y., 157, 12 N. E., 568, 60 Am. Rep., 437; *Dunyckinck v. New York Elev. R. Co.*, 125 N. Y., 710, 26 N. E., 755; *Cogswell v. New York, N. H. & H. R. R. Co.*, 103 N. Y., 10, 8 N. E., 537, 57 Am. Rep., 701; *Peyser v. Metropolitan Elev. Co.*, 13 Daly, 122; *Smith v. New York Elev. R. Co.*, 18 N. Y.

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Supp., 132; *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y., 576, 29 N. E., 802, 14 L. R. A., 344.

The same doctrine is laid down in *Cum. Tel. Co. v. United Electric Ry. Co.*, 93 Tenn., 492, 29 S. W., 104, 27 L. R. A., 236. In that case this court quoted approvingly the case of *Hudson River Tel. Co. v. Turnpike Co.*, 135 N. Y., 393, 32 N. E., 148, 17 L. R. A., 674, 31 Am. St. Rep., 838, which said:

"We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon its own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury."

Again on pages 520, 521, of 93 Tenn., page 111 of 29 S. W. (27 L. R. A., 236):

"The important consideration is that a thing of value has been taken from the plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of justice that the public, not the individual citizen should bear the burden imposed upon the private property for the public benefit. That defendant's acts may have been authorized and lawful can make no difference. The legislature has not the power (except, perhaps, as to corporate franchises) to authorize, and in this case

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it has not undertaken to authorize, the taking of private property for a public use without compensation."

In *Booth v. Ry.*, 140 N. Y., 272, 35 N. E., 593, 24 L. R. A., 105, 37 Am. St. Rep., 552, it is said:

"But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad, carries with it immunity from liability in executing the work for consequential damages to private property, to the same extent as pertains to the sovereign in executing public works (*Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y., 42), it is now the settled doctrine in this State that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual. *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y., 10, 8 N. E., 537, 57 Am. Rep., 701. This doctrine accords with reason and with the presumed intention of the legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges, they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability

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for injuries to private property, as though it was acting as a strictly public agent."

See, also, *Long Island Ry. Co. v. Garvey*, 159 N. Y., 334, 54 N. E., 60.

In *Madison v. Ducktown, etc., Co.*, 5 Cates, 331, 83 S. W., 658, noxious fumes and smoke were found to be sufficient to constitute a nuisance. With reference to location and operation the court (page 342, p. 660, 83 S. W.) said:

"The court of chancery appeals finds that the defendants are conducting and have been conducting their business in a lawful way, without any purpose or desire to injure any of the complainants; that they have been and still are pursuing the only known method by which these plants can be operated and their business successfully carried on; that the open-air roast heat is the only method known to the business or to science by means of which copper ore of the character mined by the defendants can be reduced; that the defendants have made every effort to get rid of the smoke and noxious vapors, one of the defendants having spent \$200,000 in experiments to this end, but without result."

"It is to be inferred from the description of the locality that there is no place more remote to which the operations referred to could be transferred."

And again (page 358, page 664 of 83 S. W.):

"A judgment for damages in this class of cases is a matter of absolute right, where injury is shown."

In view of these and many other authorities, we are

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of opinion that there was no error in the charge of the court, as claimed by the defendants, except as hereinafter indicated.

It remains to apply the principles laid down as determining liability to the facts of this case, with such criticisms and modifications as we think are proper under the facts.

As before stated, tracks were laid in front of the property in controversy, and about 225 feet from it, as early as 1851 or 1852, and the entire traffic and travel of the Nashville, Chattanooga & St. Louis Railway and Louisville & Nashville Railroad to and from the South passed over these tracks. With the increase of travel and traffic the cars have been caused to pass more frequently than when the roads first commenced operations; and other tracks have been laid entering into the terminal station, and passing through it, in order to accommodate the increase.

When the first tracks were laid, the property now in controversy, as well as that contiguous, was vacant. With the growth of the city this space has been occupied and residences have been erected.

Thus both the travel and traffic of the roads, as well as the growth of the locality, have gone hand in hand.

We are of the opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy.

In other words, the roads have the right to accom-

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moderate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property, and for this purpose to lay such additional tracks, side tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight; and it is only for the additional conveniences of roundhouses sandhouses, coal bins, coal chutes, and the switchyards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that plaintiff can complain, if they materially damage the plaintiff's property.

There has been no effort made to distinguish between the damage caused by the entrance of trains and passing of trains and exit of trains from the station and switching trains in operating the road, and the operation of the switch tracks, the coal bins, coal chutes, roundhouse, sandhouse, and other facilities introduced and operated as part of the terminal facilities.

It is only for the latter that plaintiff has a right of action, and proof should have been confined to that feature of the situation, and not to the general discomfort and damage caused by the entering and departure of trains from the station, as well as the operation of the other facilities.

Again it is not every inconvenience or discomfort that will entitle a property holder to damages, even though

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it be material or considerable, and especially as against a public or quasi public enterprise.

The noise of paved streets and of street cars is a material discomfort to abutting owners. The smoke from factories, hotels, and manufacturing establishments may form a material discomfort and annoyance to persons living near by; but these are discomforts and annoyances that the individual must bear in deference to the convenience and comfort of the public.

The noise of trains passing through the country districts and the dust of vehicles passing along the public highways may be a great annoyance to residents along the line of such roads; and the rumbling of carriages of belated revelers and of early market wagons along the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but it is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceeds to such an extent as to injure the usable and rental or permanent value of the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof. See *R. R. v. Bingham*, 87 *Tenn.*, 522, 11 S. W., 705, 4 L. R. A., 622; *Demarest v. Hardham*, 34 N. J. Eq., 469.

This distinction will, we think, tend to harmonize to a large extent cases which appear to be, and are, no doubt, somewhat in conflict with the cases we have cited.

In other words, there are cases, some of them cited by

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counsel, which seem to hold that damages will not be awarded when they arise from the careful operation of lawful enterprises; but these cases, when carefully analyzed, do not present such a strong state of facts as shows a material injury to the property, amounting to a taking of it in part or in whole; but they present cases where the inconvenience and damage do not amount to a nuisance, and, hence, being done in the prosecution of a legal, public business, they do not present a case for damages.

The liability of defendants is, we think, to be determined by the principles we have laid down; and it remains to consider the question of damages, if there is liability.

One assignment of error is that the damages are so excessive as to indicate passion, prejudice, or caprice.

In our opinion, there are two theories upon which damages might be estimated or based, if there is liability.

One is the theory that the defendants are carelessly and negligently operating their property so as to make it an unnecessary and unwarrantable and hurtful nuisance, while at the same time they have it in their power to erect the evils and obviate the trouble by adopting other means, and being more careful in the manner of operating the yards; and coupled with this, is the presumption that the nuisance will be only temporary, and the evil will be remedied.

In that aspect of the case recurrent damages to the

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use and enjoyment of the property may be recovered from time to time until the nuisance is abated.

In such case the measure of damages will be the injury to the value of the use and enjoyment, which may be measured, to a large extent, by the rental value of the property, and to what extent that rental value is diminished.

The other theory is that the yards, etc., are carefully and properly operated, so much so as can be done considering the use of the property; but the location of the yards, etc., and their proper operation nevertheless causes an actionable injury to the plaintiff's property. In such case it is not contemplated that any change in operation will be made, and the damage will continue so long as the yards are continued, which will be permanent.

In such case the proper measure of damages will be the injury to the fee or permanent value of the property by the continued and permanent operation of the yards. To the extent that such permanent injury is inflicted, the property is, in a sense, taken or appropriated.

The doctrine of successive suits rests upon the following principles:

- (1) That the act complained of is a nuisance.
- (2) That it may be abated or discontinued, and until that is done damages may be recovered from time to time.

This assumes that the nuisance will be abated, and

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that the cause of the injury is not permanent, nor intended to be so.

On the other hand, when the operation of the yards is lawful and reasonable, and the injury results from the location and necessary operation, and it is not contemplated to be removed or capable of being removed, then the damages are permanent, and they should be estimated on the permanent injury to the property in the depreciation of its value in the market.

Now, upon this feature the measure of damages in the record is in a very unsatisfactory condition.

The declaration in its different counts claims damages upon each theory; that is, some of the counts for damages for use and occupation, and others for damages to the value of the property. There were other counts alleging damages to the furniture.

Much proof was taken showing damages in a general way—that is, injury to the property, both real and personal; but there is very little, if any, estimate of salable value, and none of rental value or rental depreciation. It is not shown how much the rental or usable value has been diminished. It is not shown, in definite estimates, how much the permanent value of the property has been depreciated.

The case was presented to the jury upon all the counts; that is, permanent damages, to the property, temporary damages to the use, and damages to the furniture.

But when the court came to charge the jury all claims

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for damages to furniture were withdrawn; all claims for damages to the fee or permanent injury were, at plaintiff's request, withdrawn; and the case went to the jury alone upon the question of damages to the use and occupation—that is, to the rental or usable value of the real estate.

It must have been confusing to the jury to have the matter submitted to them in this way, requiring them to eliminate from their minds the damage to the personal property, and the permanent damage to the realty, and to consider only the injury to the rental value.

There is almost, if not an entire, absence of any basis for an estimate of the depreciation of the property in rental or usable value.

It was shown in the proof, over protest, that the value of the real estate was \$7,000. This was for the purpose of furnishing a basis for its rental or usable value, and was so confined; the argument being that the injury to the rental or usable value of \$7,000 would be more than that of a \$2,000, or less than of a \$20,000.

In this condition of the record it is not improbable that the jury were misled into believing they could look to the injury to the personal property and the permanent injury to the property, whereas they could only look, as the case was finally submitted to them, to the damage to the use and enjoyment of the real property during the time the terminal property was being operated; that is, from January, 1900, to the bringing of the suit in 1902. This was a period of about thirty-two months, during

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about six of which plaintiff did not occupy the premises; but was away voluntarily for the summer.

The damage found was \$4,000. This, for the use of a property worth \$7,000, for only 32 months, would be grossly unreasonable for rental or usable value, even if the property was rendered uninhabitable.

It would be at the rate of \$2,000 per year for a property which, from its value, would, perhaps, rent for not more than \$600 per annum.

So that, if the plaintiff had lost the entire use or rent of his property, the amount found as damages therefor was grossly excessive, even taking into consideration, in addition to the rental, the destruction of the trees, flowers, shrubbery, etc.

Treating the case, as we must, upon the record, that only temporary damages were awarded, they are so excessive as to indicate either misapprehension by the jury or showing passion, prejudice, or caprice on their part, which must vitiate their verdict.

We have not been able to find in the record any evidence of the rental or usable value of the property.

There is no evidence to show what the property would have rented for before the terminal plant commenced operation, nor how much, if any, that rental value had been diminished.

. Nor is there any evidence or estimates in figures of the permanent injury to the property, if that was to be considered.

Evidence was introduced to show that smoke, soot,

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cinders, dust, and noise were caused by other industries than those of the terminal company.

In regard to the several assignments on this feature of the case we are of opinion that it was competent to show that the property in controversy was injuriously or prejudicially affected by smoke, dust, cinders, etc., from other sources, but not to show the effect of same on property near by or contiguous to the plaintiff's property.

Neither is it competent to show how other property contiguous to or near by that of plaintiff has been affected by the installation of and operation of the terminal plant, but the proof should be confined to the premises of plaintiff.

Nor is it competent to compare the noise existing at plaintiff's residence with that prevailing in other portions of the city; nor to show that Nashville, generally, is a dirty, smoky, noisy place or city.

Other minor errors are assigned, which it is not necessary to pass on specifically.

For the reasons we have indicated, the judgment of the court below must be reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

Upon this new trial plaintiff should elect whether he will claim for temporary recurrent damages to his property in its use and rental value, or whether for permanent injury, and proof should be confined accordingly. So, also, all evidence as to damages to furniture

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should be eliminated, and not put before the jury. So, also, should the proof be limited to the damage caused by the operation of the roundhouse, sandhouse, coal chutes and bins, and the tracks used in operating the same, excluding such inconvenience and damage as arises from the operation of incoming or outgoing passenger and freight trains into the station, and the operation of such switches as are required to handle the same in entering or leaving the station. All other matters should be excluded from the jury as tending to confuse them.

In the present state of the record, we cannot say whether defendants are liable for any amount.

Plano Mfg. Co. v. Schell et al.

PLANO MFG. CO. v. SCHELL *et al.*

(*Nashville*. December Term, 1904.)

1. **MARRIED WOMAN.** Lands held as general estate subject to execution.

An execution from a justice's judgment against a married woman may be levied on lands held by her as a general estate.

Cases cited and approved: *Howell v. Hale*, 5 Lea, 506; *Yeatman v. Bellmain*, 6 Lea, 491.

Cited and distinguished: *Woodfolk v. Lyon*, 98 Tenn., 274.

2. **SAME.** Lands of, subject to deed of trust can be reached only by bill in chancery.

Where such lands have been conveyed in trust to secure debts, the judgment creditor, with return of *nulla bona*, may maintain a bill in chancery to have the trust deed foreclosed, the debts secured thereby paid off, and the surplus applied to the satisfaction of his judgment, and such surplus can be reached in no other way.

3. **SAME.** Plea of coverture cannot be interposed as defense to such bill.

The chancery proceeding is not a new suit against which she has a right to interpose the defense of coverture, but is merely in aid of the execution at law, and its object and purpose is to execute the judgment of the justice.

4. **QUESTION RESERVED.** Right to new judgment in chancery court.

The question is reserved and not decided, because not raised by the demurrer in the court below, as to whether, in such proceeding in chancery court, the judgment creditor is entitled to a new judgment, based upon the justice's judgment, against the married woman, over her protest, although she submitted to the judgment before the justice.

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FROM SUMNER.

Appeal from the Chancery Court of Sumner County.
—J. W. STOUT, Chancellor.

D. B. PURYEAR, for Plano Mfg. Co.

SEAY & SEAY, for Schell et al.

MR. JUSTICE WILKES delivered the opinion of the Court.

This cause is before us on bill and demurrer. The chancellor sustained the demurrer, and the complainant has appealed, and assigns his action as error.

The case made by the bill is that complainant obtained judgments before a justice of the peace against Schell and wife aggregating \$134.25, upon which executions issued and were returned *nulla bona*. Mrs. Schell did not plead her coverture and judgments went against her before the justice by default.

Previous to this time, Mrs. Schell, with her husband, executed a deed of trust upon certain lands, which were her general estate, to secure other debts.

After complainant's executions were returned *nulla bona*, he filed a bill in chancery, under the provisions of the statute, to pay off the debts secured thereby, and apply the the surplus or remainder to his judgments. He also prayed for a new judgment in the chancery court, based upon the justice's judgments.

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The demurrer raises two grounds—virtually the same—that the lands of a married woman cannot be subjected to a judgment against her by a proceeding of this character, and that the interest of a married woman in her general estate cannot be divested out of her by such proceedings, but only by a conveyance with privy examination.

In argument in this court it was further urged that a second judgment against a married woman cannot be rendered against her over her own protest, even though she may have submitted to the original judgment in the court below.

We need not consider this question, as it is not raised by the demurrer in the court below.

It is not denied that executions upon these justices' judgments might have been levied upon the married woman's land held as her general estate, if the same was not incumbered by the deed of trust; but it is said the present proceeding is virtually and in law a new suit against which she has a right to interpose the defense of coverture.

We think this contention not well made.

The chancery proceeding is merely in aid of the execution at law, and its object and purpose is to execute the judgment of the justice by applying the property of the married woman to its satisfaction, which might have been done by an ordinary execution, but for the fact there is an incumbrance on the land, and the legal title is not in the married woman, but in the trustee. But her

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interest in the surplus after paying the trust debts is subject to her debts, and can only be applied in the mode attempted.

As before stated, the right to a new judgment, based upon the original, is not involved, because not raised in the court below by the demurrer.

This question is virtually settled in the cases of *Howell v. Hale*, 5 Lea, 406, and *Yeatman v. Bellmain*, 6 Lea, 491, and other cases, more or less directly.

This is not the case of an effort to subject the separate estate of a married woman to a judgment against her, as was the case in *Woodfolk v. Lyon*, 98 Tenn., 274, 39 S. W., 227, in which it was held that the creditor's remedy against the separate estate of a married woman was not in any way aided by a judgment against her, and that such judgment would have no greater effect than the original debt, but could only be made out of such separate estate if the married woman had charged it on such estate.

Here the effort is to make the judgment out of the general estate of the married woman, and not out of her separate estate.

We are of opinion the court was in error in sustaining the demurrer, and the decree of the court below is reversed, and the cause remanded to be proceeded with to final decree.

Appellees will pay the costs of appeal.

Blue v. Gunn.

BARNEY BLUE *v.* L. F. GUNN.*(Nashville, December Term, 1904.)*

FIXTURES. Commercial finishing materials deposited in a building to be used in finishing it, but not physically attached thereto, do not pass in conveyance of land, when not mentioned.

Commercial finishing materials for a building, such as doors, mantels, casings, columns, etc., not especially made for the building, and available for use in any building, purchased by the maker of a deed of trust, and deposited in the building embraced in such deed of trust for the purpose of annexation thereto, but in no manner physically attached thereto, and not mentioned in the conveyance of the property, does not constitute such fixtures as would pass to the purchaser of the property on foreclosure of such deed of trust.

Code cited and construed: Secs. 3531, 3539 (S.); secs. 2739, 2740, 2745 (M. & V.); secs. 1981, 1981a, 1985 (T. & S. and 1858).

Cases cited and approved: *Bank v. Wolf Co.*, 6 Cates, 255; *Thweat v. Stamps*, 67 Ala., 96; *Robertson v. Phillips*, 3 G. Greene (Iowa), 220; *Harris v. Scovel*, 85 Mich., 32; *Carkin v. Babbett*, 58 N. H., 579; *Peck v. Batchelder*, 40 Vt., 233; *Woodman v. Pease*, 17 N. H., 282; *Miller v. Wlason*, 71 Iowa, 610; *Burnside v. Twitchell*, 43 N. H., 390; *Williamson v. Railroad*, 29 N. J. Eq., 311; *Hoyle v. Railroad*, 54 N. Y., 315.

Cases cited and distinguished: *Daniel v. Weaver*, 5 Lea, 393; *Halley v. Alloway*, 10 Lea, 523; *Grewar v. Alloway*, 3 Tenn. Chy., 584; *Steger v. Arctic Refrigerating Co.*, 89 Tenn., 453; *Grosvenor v. Bethell*, 93 Tenn., 579.

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FROM LAWRENCE.

Appeal from the Circuit Court of Lawrence County.
—SAM HOLDING, Judge.

ROBERT B. WILLIAMS and L. B. WHITE, for plaintiff.
W. R. KING, for defendant.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The question to be solved on this record is whether or not certain doors, mantels, casings, columns, etc., deposited in a building for the purpose of annexation, but which, as a matter of fact, were never physically attached to the building passed to the purchaser under a mortgage sale of the premises.

The facts revealed in the record are that plaintiff and wife on the 17th day of June, 1901, executed a deed of trust on certain real estate to James T. Dunn, trustee, to secure an indebtedness to one D. E. Rose for the sum of \$1,000. There was a foreclosure of this trust deed, and the property was purchased by M. S. McDougal for the sum of \$2,100. The latter sold the property in a short time thereafter to the defendant, L. F. Gunn. It appears that when the property was first mortgaged a

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house had been erected upon the premises, which was not entirely finished. Prior to the sale by the trustee, the plaintiff mortgagor had bought certain finishing material, and deposited it in a room of the building on the second floor. The material consisted of doors, mantels, casings, columns, corner beads, etc., which had been ordered with the intention of being used in this house, but none of it was attached in any way to the building.

It further appears that this finishing material was not especially designed for that particular house, but could be utilized in any other residence. The plaintiff lived on the property at the time the trust deed was executed, and continued to occupy it until after the foreclosure sale. It further appears that in the deed from the trustee to the purchaser said material was not mentioned, nor was it mentioned in the trustee's advertisement of the foreclosure sale. There is evidence tending to show that plaintiff at all times claimed this material, and after the first sale gave notice to the purchaser, McDougal, that he claimed it. It is also shown that he notified the trustee before the sale not to sell this material, and claimed it as his property. It further appears that, about a year after L. F. Gunn went into possession of the premises under his purchase from McDougal, he used said material which he found stored in the building for the purpose of completing it. Thereupon the plaintiff, Barney Blue, who was the original mortgagor, and had purchased this material and left it in the building, brought suit to recover the sum of \$148, the value of

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said material. There was a verdict and judgment in the court below in favor of the defendant. The plaintiff appealed, and has assigned errors.

The disputed question of law is whether said material passed, under the mortgage sale, as fixtures, or whether it remained the personal property of the original mortgagor.

As already stated, said material was not mentioned in any of the various conveyances of the property, and there was no physical attachment of said material to the building; and, while this material was originally purchased to be affixed to this building, it was commercial finishing, carried in stock by dealers, and could have been used on other buildings.

While the question thus presented is of first impression in this State, so far as we are advised, it seems to have been settled as a matter of legal controversy in many other States. The question of what constitutes a fixture has usually arisen in cases where the article, appurtenance, or material has been affixed to the freehold, and the question for determination in that class of cases was whether the fixture could be detached from the freehold; the solution of that question being dependent generally upon the intention of the parties in annexing it, and whether the right of removal had been reserved. This phase of the question was fully considered by this court at the present term in the case of *Bank v. Wolf Company*, 6 Cates, 255, 86 S. W., 310, in an elaborate opinion by Judge Neil.

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But as already observed, the question presented by this record is whether an article which has been deposited upon the premises with a view of annexation, and for the purpose of finishing a building, thereby becomes a part of the realty, in such a sense that it passes under the deed to the purchaser. .

The definition of a fixture usually given is, "An article which was a chattel, and which, by being physically annexed or affixed to the realty, becomes accessory to it, and a part and parcel of it." 13 Am. & Eng. Ency. of Law (2 Ed.), p. 596.

It thus appears that annexation is the controlling element in the very definition of a fixture, and we find on examination that the overwhelming weight of authority in this country is that the physical annexation of a chattel to the realty is necessary, in order to render it a part of the realty.

See cases cited in 13 Amer. & Eng. Ency., p. 600.

But the question as to the necessity of actual attachment has also arisen as to articles which have not been annexed to the land, but have merely been brought on or near to the land with the intention of annexing them. The great weight of authority is that such articles are still to be considered as chattels. Rails lying on the land, and not yet placed in a fence, have been held to be personalty. *Thweat v. Stamps*, 67 Ala., 96; *Robertson v. Phillips*, 3 G. Greene (Iowa), 220; *Harris v. Scovel*, 85 Mich., 32, 48 N. W., 173.

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So of lumber intended for a building. *Carkin v. Babbett*, 58 N. H., 579.

So windows and window blinds made to be used in a house, but not actually put in place and fastened, nor otherwise annexed to it, are articles held not to be a part of the realty. *Peck v. Batchelder*, 40 Vt., 233, 94 Am. Dec., 392.

So of a stone brought within a dooryard to be placed as a doorstep. *Woodman v. Pease*, 17 N. H., 282.

And so of machinery and parts thereof. *Miller v. Wiason*, 71 Iowa, 610, 33 N. W., 128; *Burnside v. Twitshell*, 43 N. H., 390.

So the rolling stock of a railroad is held not to be treated as realty.

In *Williamson v. N. J. Southern R. Co.*, 29 N. J. Eq., 311, it was said:

"The criterion above stated, of actual annexation to the freehold as a rule for determining when chattels become part of the realty, is as well settled in this State as any other rule of property. Exceptions founded on fanciful and groundless definitions only tend to produce uncertainty and confusion in the rules of property, which should be permanent and uniform. . . . Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their definitive character as personality by being affixed to and incorporated with the realty."

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There are authorities which hold a contrary doctrine, being based on the theory that material deposited on the land for the purpose of becoming a part thereof, or machinery deposited in a house for the purpose of being attached thereto, is, in the eye of the law, constructively attached thereto. But as said by the author in *Am. & Eng. Ency. of Law*, supra:

"Of the cases treated as illustrations of constructive annexation, some are merely cases of temporary severance, in which the articles, though not at the time actually attached, are treated as still annexed and part of the realty, and the term has at all times been applied to deer in a park, fish in a pond, and doves in a dovecote, which passed to the heir, and not to the executor."

This class of cases was discussed in *Williamson v. N. J. Southern R. Co.*, 29 N. J. Eq., 311, in which it was said:

"The illustrations of doves in a cote, deer in a park, and fish in a pond are entirely inapplicable to the present subject. They go with the inheritance, for special and peculiar reasons. In *Amos & Ferrard on Fixtures*, they are classified under the head of heirlooms—a class of property entirely distinct from fixtures."

See, also, *Hoyle v. Plattsburgh, etc., R. Co.*, 54 N. Y., 315, 13 Am. Rep., 595.

It remains to notice several cases decided by this court which are supposed to illustrate the policy of our laws upon this subject. They are cases in which furnis-

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hers of material for a building are allowed a lien on the lot upon which the building is to be erected, whether the material was ever actually used or not.

In *Daniel & Co. v. W. H. Weaver et al.*, 5 Lea, 393, this court said it is not the actual use of lumber in repairs to a building by the owner that gives the furnisher a lien, but the furnishing under the contract for that use, and the lien exists whether the lumber was used or not. That case involved a construction of Shannon's Code, section 3531, establishing a mechanic's lien and furnisher's lien on any lot of ground or tract of land upon which a house has been erected, built, or repaired, or fixtures or machinery furnished or erected, or improvements made by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder, or machinist who does the work, or any part of the work, or furnishes the materials, or any part of the materials, or puts therein any fixtures, machinery, or material, either of wood or metal, and in favor of all persons who did any portion of the work or furnished any portion of the material for the building contemplated in this section.

Section 3539 provides:

"The lien shall include the building, fixture, or improvement, as well as the lot or land, and continue for one year after the work is finished or materials are furnished."

The court, in dealing with these two sections, held that it is the furnishing of the lumber for repairs, etc.,

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that creates the lien, and that it does not depend upon the use of it by the purchaser whether the seller shall have a lien. Otherwise, by not using it for a year, the owner could entirely defeat the lien of the purchaser. Such is not the proper construction of said acts, and this is made more clear by the provision in section 3539 that the lien shall continue for one year "after the work is finished," in favor of the workman, or "materials are furnished," as to the furnisher. The furnisher may, therefore, within one year after he has delivered the materials contracted for, have his remedy by attachment to enforce his lien.

The case of *R. H. Halley et al. v. L. E. Alloway et al.*, 10 Lea, 523, was another case involving the furnisher's lien for repairing and furnishing the Grand Opera House in the city of Nashville. The question presented for determination in that case was whether the things claimed to have been furnished entitled the furnisher to a lien on the house and lot. The material furnished consisted of stage machinery, such as pulleys rollers for cylinders, etc., used for fitting up the stage—some attached and some not—chairs furnished and fitted to the floor, and seats for the accommodation of the audience, painting the scenery, curtains, and the like. The court held the nature of the thing done and the character of the house repaired, and for which the materials were furnished, as well as the intent of the party building, served to guide the correct conclusion as to whether the work done was work on the house and became part of it.

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These elements are better guides than the old idea as to fixtures which was whether the thing was permanently attached and fixed in or to the freehold. In getting up a theater, the whole building, considered in reference to its use, makes the house contracted for. All that serves to complete and furnish such house for the purpose designed makes up the house, and is part of it when completed. Scenery, seats, pulleys, etc., and the like, make up a necessary part of a building designed for theatrical exhibitions, as much as do the counters on which goods are exposed for sale in a retail mercantile store. It is probable the scenery and other articles herein mentioned are as permanently attached to and were a part of the building as such counters.

In *Steger v. Arctic Co.*, 89 Tenn., 453, 14 S. W., 1087, 11 L. R. A., 580, it was held that statutes creating liens upon real estate in favor of those, who under contract with the owners, have furnished lumber or materials for erection of buildings machinery, etc., thereon, are construed liberally in favor of lienholders, as regards the subject-matter to which the lien should attach. In that case it appears that the Arctic Refrigerating Company erected a factory on a lot in Nashville for the manufacture of vapor for cold storage. By permission of the city this company laid subterranean pipes in the streets, connecting with its factory, to convey the vapor to its customers. P. supplied labor and materials in the erection of the factory, and also furnished and laid down the pipes in the streets. It was held that the plant, includ-

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ing lot, factory, pipes, etc., is an entirety, and P.'s lien for materials furnished or labor done upon any part of it attached to the whole.

The case last cited, it will be observed, does not even remotely touch the question with which we are dealing in the present case.

In the case of *Grosvenor v. Bethell*, 93 Tenn., 579, 26 S. W., 1096, one of the objects of the bill was to determine whether or not Bethell, the purchaser at first mortgage sale, thereby acquired title to all the theater furniture and fixtures; the same not having been specifically mentioned. It was held that a mortgage by an incorporated opera house company, made after the purchase of lot, and while the theater buildings are in course of erection thereon, conveying the lot and "all the buildings and improvements thereon or to be erected thereon," operates to pass all furniture, fixtures, and furnishings then or thereafter placed in the theater building, and essential to its successful operation. Citing *Halley v. Alloway*, 10 Lea, 523, as settling this question.

In *Grewar v. Alloway et al.*, 3 Tenn. Ch., 584, it was held that the rollers, pulleys, etc., for shifting scenery, and other stage properties, were fixtures or machinery, within the meaning of the mechanics' and furnishers' lien act. It was further said that the movable machinery and flying stages of a theater, necessary for the purpose of theatrical exhibitions, are trade fixtures, and removable by the tenant, as between him and his landlord, but, as between the owner and mechanic,

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are subject to the mechanic's lien law. The question whether a thing is a fixture or not, as between owner and mechanic, depends little upon the mode of annexation. Its fitness for the particular place where it is annexed, its being connected with the general business conducted there, and other facts going to show the intent of the owner to make one thing of the land and chattels to carry out a general purpose, would have more effect upon the question than the mode or permanence of the annexation. It appeared in that case that the chairs had been fastened to the floor, and it is to be inferred that the other property was also in some way attached to the building.

It is unnecessary to pursue this line of cases any further, since we deem the question settled by the great weight of authority in favor of the contention that such materials are not fixtures, and are removable by the mortgagor.

It results from this that the judgment of the circuit court must be affirmed.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY v.
HAYNES, CARUTHERS & HYDE.

(*Nashville*. December Term, 1904.)

AFFIRMANCE. Of justice's judgment for his failure to file papers, on production thereof by appellee.

Where, in an appeal from a judgment of a justice of the peace, the justice fails to file the papers in the circuit court within the time required by statute, the appellee, upon production of the papers by him with a motion for affirmance, because of such failure of the justice, is entitled, as a matter of right, to his judgment of affirmance, and this motion for affirmance cannot be intercepted by counter motion upon the part of the appellant to be allowed to file the papers and prosecute his appeal.

Code cited and construed: Secs. 4873-4875 (S.); secs. 3853-3860 (M. & V.); secs. 3142-3144 (T. & S. and 1858).

Cases cited and approved: *Hayes v. Kelley*, 111 Tenn., 294.

Case cited and distinguished: *Humphrey v. Humphrey*, 1 Swan, 154.

FROM WILLIAMSON.

Appeal from the Circuit Court of Williamson County.—J. A. CARTWRIGHT, Judge.

HENDERSON & HENDERSON, for Railroad.

EDGER HAYNES, for defendants.

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Mr. CHIEF JUSTICE BEARD delivered the opinion of the Court.

In this case there was a judgment rendered by a justice of the peace, from which the plaintiff in error appealed to the circuit court. The magistrate failed to file the papers in the cause as required by section 4873 of Shannon's Code, so that, a few days after the term of the court to which the appeal was taken began, defendant in error presented the papers and moved for an affirmance of this judgment. The motion was resisted by the plaintiff in error, and at the same time the court was asked to permit the latter "to prosecute his appeal." This was denied, and the affirmance was entered in accordance with the motion of the defendant in error.

The action of the circuit court in this regard is assigned for error. The section referred to provides as follows: "Whenever an appeal shall be prayed and perfected from the decision of any justice of the peace in this State, it shall be the duty of said justice to file the papers in the case in the office of the clerk of the circuit court at least five days before the meeting of the circuit court. . . . Any justice of the peace failing to comply with this section shall have no fees or costs."

Section 4874 provides thus: "If the papers are not filed within the time prescribed, the appellee may on production thereof have an affirmance of the justice's judgment with costs."

These two sections are taken from the act of 1809. In

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view of this last section, it is clear that, nothing else being in the way, the judgment in this case was properly rendered. Under it the court had no alternative, upon a default being shown on the part of the justice in failing to file the papers as required by section 4873—the same being produced by appellee—but to grant a judgment of affirmance. But it is said, and properly, that the rigor of section 4874, which is really section 2 of chapter 63 of the Acts of 1809, is moderated by sec. 2, c. 119, of the Acts of 1811, brought into the Code, and there numbered section 4875. This section is as follows: "If the justice fails to return the papers within the time prescribed, but returns them during the term to which the same are returnable and the appellant fails to appear and prosecute his appeal, if he is the original defendant, the plaintiff shall have judgment final, by default, for the amount of the judgment of the justice against the appellant and his sureties for the debt and costs."

It is insisted, inasmuch as it was not the fault of the plaintiff in error that the papers were not filed within the time required by law, it should have been permitted to prosecute its appeal, and that, taking these sections of the Code together, it is evident the legislature intended the judgment of affirmance should follow a default in prosecuting an appeal after the papers were returned, and not the default of the justice in failing to return the papers in time. This contention is rested on *Humphrey v. Humphrey*, 1 Swan, 154. That case was de-

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cided in 1851, and it was there said that the later act was intended to modify the strictness of the earlier one, and thus relieve the appellant from the loss incident to the negligence of the magistrate, and make him responsible only for his own laches; and it was also intimated, if not held, that the act of 1811 impliedly repealed so much of the act of 1809 as authorizes a judgment of affirmance upon the failure of the magistrate to file the papers in time. It is evident, however, that it was not the understanding of the framers of the Code that there was an implied repeal of any part of the act of 1809 by the later statute, because they bring forward the provisions of both of these acts, and, with slight alteration, they constitute the sections of the Code already quoted. Upon an examination of these sections, we discover no inconsistency or contradiction in them. Each can be made effective without conflicting with any part of the other sections. Thus construed, they have this meaning. If the justice of the peace fail to perform his statutory duty, then, upon the production of the papers by the appellee, he is entitled to have his judgment of affirmance. If he fails, however, to produce the papers, but the justice of the peace does at any time during the term, then this judgment of affirmance cannot go, save upon the failure of the appellant thereafter to prosecute his appeal. In other words, two different contingencies are provided for: First a default upon the part of the magistrate, of which the appellee may take advantage if he sees proper; and, second, if the appellee fails to se-

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cure this advantage, and the papers are produced by the justice of the peace, his judgment then can only be affirmed upon the failure of the appellant to prosecute his appeal.

In other words, we think that after the papers have been produced by the appellee, with a motion for a judgment of affirmance because of the fault of the magistrate, this motion cannot be intercepted by a counter motion upon the part of the appellant to file the papers and prosecute his appeal, as provided for in section 4875. It is otherwise, however, where the papers are presented by the magistrate.

In addition, it is to be noted that the present case is distinguishable from the case in *Swan* in this: In that case the papers were produced in open court by the justice of the peace, when for the first time the appellee insisted upon an affirmance under the act of 1809, while in this the papers are produced by the appellee in strict accordance with the act. We think in that case the motion to affirm came too late, while in the present the motion to prosecute the appeal.

This construction of these sections harmonizes with the system embracing appeals to the circuit court. In *Hayes v. Kelley*, 111 Tenn., 294, 76 S. W., 891, it was held that the provisions of the statute requiring that in certain cases, where an appeal has been prayed from the judgment of the county court to the circuit court, a transcript of the record shall be delivered to the clerk of the circuit court by the first day of the term to which

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the appeal is taken, and that, if the transcript is not filed within the time so prescribed, the judgment of the county court shall be affirmed, are mandatory, and upon the failure to comply therewith it is imperative upon the circuit court to affirm the judgment appealed from. The terms of the statute there called in question are not more mandatory than those used in section 4874. In both cases, we think, wherever the statutory default exists, that upon the production of the transcript in the one case, and the original papers in the other, the appellee is entitled, as a matter of right, to his judgment of affirmance.

Save for the imperative terms of the section in question, we would have no doubt the plaintiff in error would have been entitled, upon the facts presented, in the affidavits of its counsel to prosecute its appeal in the present case with a view to having the cause disposed of upon its merits. In the face, however, of its provisions we do not think this could be accorded. The judgment of the lower court is therefore affirmed.

Nashville v. Webb.

MAYOR AND CITY COUNCIL OF NASHVILLE v. B. M. WEBB
et al.

(*Nashville*. December Term, 1904.)

- 1. MUNICIPAL CORPORATIONS.** Actions against are inherently local, and must be brought in the county of their location.

Actions against municipal corporations for personal injuries are inherently local, and must be brought in the county in which such corporations have their existence and location. (*Post*, pp.434-436.)

Cases cited and approved: *Carlisle v. Cowan*, 85 Tenn., 165; *Board v. Bodkin*, 108 Tenn., 700; *Lehigh Co. v. Kleckner*, 5 Watts & S., 181, 186, 188; *Oil City v. McAbey*, 74 Pa., 249-252; *Pack v. Greenbush Township*, 62 Mich., 122.

- 2. LOCAL ACTIONS.** Statutes providing for counterpart process and prosecution of suits brought in wrong county unless abated by plea are not applicable.

The statutes providing for the counterpart process and prosecution of actions brought in the wrong county to a termination, unless abated by plea of defendant, have no application to local actions brought in the wrong county. (*Post*, pp. 436, 437.)

Code cited and construed: Secs. 4526, 4517 (S.); secs. 3526, 3517 (M. & V.); secs. 2821, 2812 (T. & S. and 1858).

Case cited and approved: *Board v. Bodkin*, 108 Tenn., 700.

- 3. MUNICIPAL CORPORATIONS.** Judgments against, in a suit in a county other than that of its location is void, and will be enjoined; case in judgment.

A judgment rendered against a municipal corporation in a suit brought against it for personal injuries in a county other than that of its location is void, and its execution will be perpetually enjoined in chancery.

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FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

K. T. M' CONNICO and HILL M'ALISTER, for complainants.

CANTRELL & M'MILLIN, for defendants.

Mr. JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed to enjoin the execution of a judgment rendered against the complainant in the circuit court of Wilson county on the 22d of January, 1901.

The facts, so far as necessary to be stated, are that about the 3d of January, 1900, the defendant B. M. Webb instituted suit in the circuit court of Wilson county against the Nashville, Chattanooga & St. Louis Railway Company and the Louisville & Nashville Railroad Company and the present complainant, hereinafter spoken of as the city of Nashville.

The original writ was served on the Nashville Chattanooga & St. Louis Railway Company at one of its local offices in Wilson county, and a counterpart was issued

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to Davidson county for the other two defendants, and served, as to the city of Nashville, upon its mayor, J. M. Head. The city did not enter its appearance in the cause, or make any defense to the action, with the result that, on the date above stated, a judgment by default was entered against it in favor of B. M. Webb for the sum of \$4,000. The ground of the action laid in the declaration in that case was that the plaintiff therein, Webb, had suffered personal injuries by reason of a defective sidewalk in the city. After judgment had been thus obtained an execution was issued to Davidson county, and while in the hands of the sheriff of the latter county, it was enjoined under the present bill. Among other reasons for enjoining the execution and canceling the judgment, it was insisted in the bill that the circuit court of Wilson county acquired no jurisdiction of the city of Nashville by the service of the counterpart writ above referred to, and the judgment was therefore wholly void. The chancery court of Davidson county took this view of the matter, and rendered a decree awarding a perpetual injunction against the execution, and declared the judgment itself void. On appeal, the court of chancery appeals affirmed the decree of the latter court. From the decree of the court of chancery appeals an appeal was prosecuted to this court, and errors have been assigned here.

We are of the opinion that the decrees of the two courts above referred to were correct. It is true, there is no statute which makes an action brought against a

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municipal corporation a local action; nor could there ever be a necessity for such statute. Actions may be made by statute either transitory or local. Transitory actions are such as are said to follow the person of the defendant wherever he may be found. *Carlisle v. Cowan*, 85 Tenn., 165, 2 S. W., 26. Such, in general, are personal actions. Actions concerning realty may be regarded in a sense as personal, inasmuch as the title thereto rests in the owner, wherever he may be, yet, in obedience to a wise public policy, such actions are usually made local by statute. But actions against municipal corporations are inherently local. These bodies cannot change their situs or their place of abode. They cannot remove from one place to another, and sojourn for a time at this point or that. They remain stationary; hence they must be sued where they are found—that is, in the county of their location. It is a misnomer, a misapplication of terms, to speak of an action against such a body as transitory, no matter what the ground may be on which the right of action rests. Such actions are not only inherently local, but it is of the greatest importance to the welfare of such bodies, and of the citizens whom they serve, that their officers should be permitted to remain at home and discharge their public duties, instead of being called hither and thither over different parts of the State to attend to litigation brought against the city through the agency of counter-part writs. *Lehigh Co. v. Kleckner*, 5 Watts & S., 181, 186, 188; *Oil City v. McAboy*, 74 Pa., 149-252; *Pack*,

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Woods & Co. v. Greenbush Township, 62 Mich., 122, 28 N. W., 746.

We are cited in the brief of defendant's counsel to the following sections of Shannon's Code:

"4526. Where there are two or more defendants in any suit in courts of law or equity, or before justices of the peace, the plaintiff may cause counterpart summons, or subpoena, to be issued to any county where any of the defendants are most likely to be found, the fact that the counterpart process is issued in the same suit being noted on each process, which, when returned, shall be docketed as if only one process had issued. If the defendants are not served, the same process shall be had as in cases of other similar process not executed."

"4517. If action be brought in the wrong county, it may be prosecuted to a termination, unless abated by plea of defendant."

It needs no argument to show that section 4526 has no application to local actions. It is perfectly obvious that a local action could not be turned into a transitory one, or one in effect transitory, by the device of uniting another person in the action, and by serving process on that person in the county in which it was desired to begin the litigation, and then issuing a counterpart writ to the locality of a defendant who could not otherwise be affected, save by an action brought in the latter county. Actions are either transitory or local, and their nature cannot be changed by the form of the process used to institute them.

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It is also equally clear that section 4517 could have no bearing upon a local action brought in the wrong county; and this, for the reason that the courts of the latter county would have no jurisdiction of such a suit, and consent itself could not give jurisdiction. This conclusion falls within the principle of *Board of Directors v. Bodkin Bros.*, 108 Tenn., 700, 69 S. W., 270.

It is also worthy of special observation that, in the case last referred to, the principles above announced in respect of municipal corporations are recognized, in the main, and the authorities from Pennsylvania and Michigan herein referred to are cited and quoted with approval.

We find no error in the decree of the court of chancery appeals, and it must be affirmed, with costs.

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GEORGE F. BOWERS *et al.* v. MYRA M'GAVOCK, Admx.,
et al.

(*Nashville.* December Term, 1904.)

1. **CHANCERY PLEADING AND PRACTICE.** Facts in answer taken to be true, where cause is set down for hearing upon bill and answer.

Where, on motion of complainant, a cause is set down for hearing upon bill and answer and is heard thereon, the statements of the answer as to all matters of fact must be taken as true. (*Post*, pp. 440, 452.)

Case cited and approved: *Rodgers v. Rodgers*, 6 Heis., 495.

2. **WILLS.** Validity can be contested by none except such as would be entitled to an interest in testator's property in case of invalidity.

No one can question the validity of a will or any provision of it, unless he stands in such relation to the testator that, in the event the provision is invalid, he will be entitled, under the law to an interest in the property involved in the controverted provision. (*Post*, pp. 450, 451.)

Cases cited and approved: *Wynne v. Splers*, 7 Hum., 407; *Cornwell v. Cornwell*, 11 Hum., 485; *Bank v. Nelson*, 3 Head, 634; *Gore v. Howard*, 94 Tenn., 581; *Ligon v. Hawkes*, 110 Tenn., 514, 516, 523.

3. **SAME.** Widow's election to take under husband's will is binding on her heirs, distributees, and representatives.

Where the widow of testator fails to dissent from his will, but affirmatively elects to take thereunder, and seeks its execution, her heirs at law and distributees, who are not heirs at law and distributees of the testator, have no such interest as en-

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titles them to contest the validity of the testator's will; for the election by the widow to take under the will of her deceased husband is binding on her representatives. (*Post*, pp. 451-456.)

Cases cited and disapproved: *Mong v. Roush*, 29 W. Va., 119; *State v. Holmes*, 115 Mich., 456.

4. SAME. Same. Widow's right of election is personal and does not pass to her representatives or heirs.

The right of election to take under the will of her husband or under the statute is personal to the widow and does not pass to her representatives or heirs; and especially is this so, where the widow has made her election to take under the will, and declined and refused to take under the statute. (*Post*, pp. 456, 457.)

Cases cited and approved: *Cannon v. Apperson*, 14 Lea, 572; *Storrs v. Hospital* (Ill.), 54 N. E., 185, 72 Am. St. Rep., 211; *Deslondes v. New Orleans*, 14 La. Ann., 552.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

CHARLES C. TRABUE and GRAFTON GREEN, for complainants.

JOHN J. VERTEES and TURLEY & TURLEY, for defendants.

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MR. JUSTICE WILKES delivered the opinion of the Court.

This bill is brought by a portion of the heirs and distributees of Mrs. Harriet Goodwyn, seeking to invalidate certain provisions of the will of her husband, William A. Goodwyn, upon the ground that the charitable trusts thereby sought to be created are invalid and void. There was an answer filed by the administratrix of Mrs. Goodwyn, the executor of William A. Goodwyn, and the trustees and commissioners appointed to execute the trust. The cause was, on motion of complainants, set down for hearing upon bill and answer, both of which are full and explicit.

The result is that the statements of the answer as to all matters of fact must be taken as true. *Rodgers v. Rodgers*, 6 Heisk., 495.

The facts, so far as necessary to be stated, are that William A. Goodwyn died on the 13th of October, 1898, in Nashville, Tenn., after making a last will and testament, in which he disposed of a considerable estate, about \$400,000 of which is involved in this litigation.

This will, executed May 18, 1893, provided most liberally for the testator's wife, and gave bequests to his half brothers and sisters, his nephews, a niece, and his wife's sister. Ten thousand dollars were also given to the University of the South, at Sewanee, the income of which was to be used alone for the education of young men too poor to pay for themselves; and none of these provisions of the will are questioned.

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The contest arises over the provisions of sections 14 and 8 of the will, and they are as follows:

"Section 14. All the balance of my estate, real, personal, or mixed, including at the death of Myra McGavock that given to her in section 11th, during her life (excepting that part of the personalty or mixed which I allow her to will or give away), I give, after death of my wife, to the State of Tennessee as trustee for the following uses and purposes, and none other. I will and desire that the State, upon the nomination of the governor, to be confirmed by the senate, appoint three commissioners, to be known as 'Commissioners of Goodwyn Institute,' and said commissioners will hold their office for four years, and until their successors are appointed and qualified; the said commissioners are to purchase a suitable lot in the city of Memphis (now taxing district), in Shelby county, Tennessee, and erect suitable buildings thereon, expending therefor such parts of this gift as to them may seem proper, and retaining the balance for library and apparatus expenses and endowment fund. They are to receive no compensation for their services, and are required to render biennial reports and accounts to the governor of all moneys received or spent, and their management of said trust, or its funds is to be at all times open to inquiry by the legislature of the State, under the fostering care of which this institution is placed. The title to the lot purchased and all other property, shall be in the name of the State, for the purposes of this trust solely. The building or

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buildings to be erected shall be satisfactory to said commissioners, but such portion thereof as can be shall be rented for the purpose of obtaining a revenue for the maintenance of a public library and public lectures. One part of said building shall be devoted to lectures, and another part to a library, and the use of the library shall be free to all, under the rules and regulations to be made by said commissioners; and the lectures shall be free, and the whole will be for instruction, and not for entertainment merely. All of the rents, profits, and income derived shall be faithfully used and applied, together with any part of this legacy not used in purchasing and building (after payment of repairs, expenses, insurance, etc.), to pay lecturers, and the purchase of books, charts, maps, and apparatus. No part of the building is to be used for political gatherings, but when the lecture hall is not used otherwise, it may be rented for musical concerts, art exhibitions, or other purposes likely to elevate public morals, and taste. I request the governor to nominate, and the senate to confirm, as the first commissioners, my friends, Samuel P. Read, Bedford M. Estes, and Rufus Lawrence Coffin, all of Memphis, Tennessee, if living and will accept. If these do not for any reason accept, then he nominate three gentlemen of Memphis of the highest integrity, purity, and responsibility. I estimate that the amount which will go to the State as trustee, under this gift, and supplemented by the additional amount which will revert to my general estate, and thus to the State, after the

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death of Myra McGavock as left to her in section 11, will amount to a large sum, and ample for the purpose intended. And every year that I live there will probably be more added, for I intend that all I may die possessed of, not otherwise disposed of by my will, shall go for this worthy purpose.

"My whole wish and desire as respects this 'Goodwyn Institute' is to afford to the future youths who may desire information upon such practical and useful subjects as will be beneficial in life. My reason for locating it in Memphis is, it was there I spent much of my life in the happy circle of wife and children. The latter sleep near her borders, as I and my wife expect to do when we die. Here I made the friends of my early life many of them are dead, but their descendants, many of them remain in Memphis, and were playmates of my children, and to them or their descendants I hope this gift may be of great benefit. This legacy for the benefit of my old home has long been thought of by myself and wife, and took shape in a will written by me in November, 1887, and now repeated. It became necessary to write this will on account of necessary changes, and to destroy that of 1887. And I mention this fact in order that my old friends of Memphis may know that I have long cherished this idea.

"If the State of Tennessee should refuse to take charge of this trust, then I direct my executors to carry out my wishes as expressed, as to them may seem best, after consultation with my friends, Judge E. H. East,

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John M. Lea, and J. M. Dickinson, all of Nashville, Tennessee. I will that the portraits of my wife and myself, and the pictures of my children, now in my dwelling in Nashville, be hung in this 'Goodwyn Institute,' to which I will them.

"Section 8. I will to the commissioners of 'Goodwyn Institute,' and to their successors, mentioned hereafter, one thousand dollars, which shall be invested only in first-class bonds, or mortgage on real estate, the interest of which only shall be always used to take care of and embellish my two lots, Nos. 132 and 133, situated on Fowler's Hill, in Elmwood Cemetery, Memphis, Tennessee, where now lie the bodies of my nine children, and where my wife and I hope to be buried when we die."

Mrs. Goodwyn participated in and approved of this long-cherished plan of Mr. Goodwyn's to establish this institute at Memphis for his will states that:

"This legacy for the benefit of my old home has long been thought of by myself and wife, and took shape in a will written by me in November, 1887, and now repeated."

He adds in another part of his will as follows:

"This legacy for the benefit of my old home has long been thought of by myself and wife and took shape in a will written by me in November, 1887, and now repeated."

Mrs. Goodwyn, the widow, the defendant Miss Myra McGavock, her sister, and the defendant Mr. Joseph H. Thompson were named as executors, and qualified as

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such on the 24th day of October, 1898, when the will was probated. Mrs. Goodwyn acted as executrix for more than four years, and until her death, in March, 1903.

Upon her death, defendant Myra McGavock, her sister, qualified as administratrix of her estate.

The complainants, who are a part of Mrs. Harriet R. Goodwyn's heirs, requested Miss McGavock, the administratrix, to bring this suit, but she refused. They then requested her to resign, so that some one could be appointed who would sue, but she refused to resign. Miss McGavock's reasons for declining to sue or to resign are set forth in the answer of all the defendants, in these words:

"Mrs. Goodwyn was her sister, and for many years she had lived with Mr. and Mrs. Goodwyn as a member of the family, in their home, and she continued to live with her sister after Mr. Goodwyn's death, until Mrs. Goodwyn herself died, in 1903. Mr. Goodwyn had provided generously for her in his will, and her sister, Mrs. Goodwyn, gave her property of great value during her life. This respondent knew the wishes and desires of Mrs. Goodwyn touching Goodwyn Institute; knew that she had elected to abide the will because she approved of its provisions, and desired the institute to be established, as Mr. Goodwyn contemplated; because she knew that Mrs. Goodwyn did not and would not take any steps to defeat the will of Mr. Goodwyn, or to de-

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prive the institute which it contemplated of the benefit of the provisions which it made."

Also that:

"Mrs. Goodwyn qualified as executrix of this will in October, 1898, and continued to act as such until her death, in March, 1903. She not only executed and carried out this will as executrix, but she assented to and accepted its provisions as widow. She commended and approved it, and elected to accept and abide it. With full knowledge of its provisions and terms, she elected to accept and approve it and to let it stand; and she refused and declined to dissent from it, or to contest it, or to assail any of its provisions or terms."

The complainants exhibited their bill on the 12th day of April, 1904. They assail the trust for Goodwyn Institute on numerous grounds.

They say in the bill that no sufficient provision is made for a trustee capable of executing the trust; that the court of chancery has "no authority" to administer a charitable trust where no sufficient trustee is designated; that the purposes of the trust are "indefinite;" that an indefinite and unascertainable portion of the purposes of the trust are "not charitable;" that the intended beneficiaries are "indefinite;" that the State has "no power" to accept a trust which is "local," and not a governmental institution; that the State has "refused" to accept the trust; that the consent of all the persons named, viz., Mrs. Goodwyn, Miss McGavock, Mr. Thompson, Judge Lea,

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Judge East, and Judge Dickinson, must be had, in the event of the State's refusal to accept, and that this has become "impossible" by reason of the death of Mrs. Goodwyn and Judge Lea; and that the bequest to keep up the graves in Elmwood Cemetery is a perpetuity and void.

The defendants, the executors of Mr. Goodwyn, the administratrix of Mrs. Goodwyn, and the commissioners of Goodwyn Institute, in their answer, deny all these propositions of the complainants. They say that it is a good, valid, definite, certain, charitable trust, and that the State has power to accept and did accept; that, in the event of the refusal of the State to accept, the executors can appeal to the court of chancery to execute the trust and that it has jurisdiction to do so; and that the bequest for the cemetery is not void, but valid.

After the death of Mr. Goodwyn, and after the death thereafter of Mrs. Goodwyn, the general assembly of the State of Tennessee passed an act which was approved April 15, 1903, and which is designated as chapter 353, p. 1068, of the Acts of 1903, and which act, after reciting the terms of the will *in haec verba*, and the death of Mrs. Goodwyn by way of preamble, proceeds as follows:

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that the State of Tennessee accept the said trust as set forth in said will, and that the governor of the State is authorized and required to nominate and appoint three commissioners, to be con-

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firmed by the senate, to be known as 'Commissioners of the Goodwyn Institute,' in compliance with the request of the said William A. Goodwyn, and in conformity with the provisions set forth and declared in his said last will and testament.

"Sec. 2. Be it further enacted, that at the end of each four years, as designated in said will, the governor of the State is authorized and required to nominate and appoint three successors to the commissioners originally nominated, appointed and confirmed, which successors shall also be confirmed by the senate, and in like manner, if any vacancy occurs in said commission during any period of four years by the death, resignation, or removal from the State of any one of said commissioners, the governor may fill such vacancy for the unexpired term of such commissioner by appointment, subject to confirmation by the senate; that by the acceptance of the trust created by the aforesaid will, the State of Tennessee does not assume the custody of the funds and property thereby devised and bequeathed; neither does it assume responsibility for the care and preservation thereof; and the executors of the said testator are accordingly authorized, empowered and directed to pay over the funds and moneys to be paid over, pursuant to the terms of the said will, to the commissioners hereafter named and appointed by the governor as the commissioners of the Goodwyn Institute, instead of to the State of Tennessee.

"Sec. 3. Be it further enacted, that this act take effect

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from and after its passage, the public welfare requiring it."

Defendants Read, Pepper, and Goodbar were nominated and appointed as trustees of the Goodwyn Institute under section 14 of the will, hereinabove quoted, and have in their possession certain of the property intended to be used for the establishment of said trust. Defendant Napoleon Hill sold to the commissioners, for the purpose of said trust, certain property in Memphis, for which he was paid out of said trust fund the sum of \$75,000.

The chancellor held as follows:

First. That the trust created by the will of William A. Goodwyn for Goodwyn Institute is a public charity, and is a legal and valid trust.

Second. That the State of Tennessee has, by the act of its general assembly which is chapter 353, p. 1068, of the Session Acts of 1903, accepted the said trust.

Third. That the complainants are estopped to set up any claim to the funds involved in this case.

Fourth. In view of the fact that they are estopped, it is unnecessary to pass upon the validity of the bequest of \$1,000 to the trustees for the care and keeping of the Goodwyn lot in Elmwood Cemetery.

The court of chancery appeals reached the same conclusion as was reached by the chancellor, but on different ground; and complainants have appealed to

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this court, and assigned virtually the same errors assigned before the court of chancery appeals.

The first question which confronts us is whether complainants occupy such relation that they can question the validity of the provisions of the will of William A. Goodwyn.

As before stated, they are a part of the distributees or next of kin of Harriet A. Goodwyn.

They are not heirs, distributees, or next of kin of William A. Goodwyn. They are in nowise related to him, and there is no privity whatever of blood or estate between them.

It has been held by this court that a stranger will not be permitted to contest the execution of a will, nor will a kinsman, who is not next of kin, and who could take nothing under the statute of distribution. *Wynne v. Spiers*, 7 Humph., 407; *Gore v. Howard*, 94 Tenn., 581, 30 S. W., 730; *Bank of Tennessee v. Nelson*, 3 Head, 634.

Thus a grandson cannot contest unless his own father is dead. *Cornwell v. Cornwell*, 11 Humph., 485.

The latest utterance upon this subject is in *Ligon v. Hawkes*, 110 Tenn., 514, 75 S. W., 1072, in which it is said:

"One who is not an heir or distributee of the testator at the time of his death, and would not have been if those under whom he claims had died before the testator, has no standing in court to resist the probate of a will, or have a probate in common form set aside for purposes of a contest."

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Accordingly it was held in that case that the father of a granddaughter, being a stranger in blood to the testatrix, and being wholly incapable of inheriting from her, even if the grandmother had been dead at the death of the testator, had no such interest as entitled him to have the probate in common form set aside, or to question the testamentary capacity of the testatrix. *Ligon v. Hawkes*, 110 Tenn., 516, 523, 75 S. W., 1072.

It is said that the contest of a will is different from an attack upon the validity, as a matter of law, of some or all of its provisions; and this is true, in a sense.

The contest of a will upon an issue of *devisavit vel non* questions the execution of a will, and the matter involved is whether the will is or is not the last will and testament of the testator, while the attack upon the validity of its provisions concedes its execution, but questions the legality of such provisions.

But the principle involved in the two cases is the same, so far as the right of a party to make the controversy is concerned.

No one can question the validity of a will, or any provision in it, unless he stands in such relation to the testator that, in the event the provision is invalid, he will be entitled to an interest in the property involved in the controverted provision.

But it is said that, if the provisions of the will of William A. Goodwyn are invalid, the property covered by it passed to Mrs. Harriet A. Goodwyn, his widow, and through her to complainants, as her next of kin.

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The answer in this case, which as we have before found, must be conceded to speak the facts, states that Mrs. Goodwyn not only accepted this will, but executed it. She not only executed its provisions as executrix, but took under them as widow. She commended and approved it, and elected to accept it and abide by it, with full knowledge of its terms and provisions, and refused and declined to dissent from it, or to contest it, or to assail any of its terms and provisions.

Under this statement, she did not merely acquiesce in it, but actively participated in carrying out the plan and scheme of her husband, to which she had cheerfully assented before his death.

At the death of William A. Goodwyn, his widow had her election to take under his will, or to dissent therefrom and take under the statute.

In the former event, she would be entitled to what the will gave her. In the latter, she would be entitled to take her one-third interest in the personal estate, there being no children or their descendants. The other two-thirds, if the will was invalid, would have gone to the next of kin of William A. Goodwyn.

Having elected to take under the will, she had no other interest than that given her by the will—that is, none under the statute; and complainants could claim nothing under her, since she only took a life estate under the will. Nor could they, even if the will were invalid, claim the two-thirds interest, inasmuch as that would

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have gone to the next of kin of William A. Goodwyn, and complainants do not occupy that position.

In other words, after her election she was estopped to claim any interest except under the will, and complainants could claim nothing under her or under William A. Goodwyn.

In making this statement, we have assumed that, if the charitable trust was void, the property would at once go back to the next of kin of William A. Goodwyn. Complainants concede this proposition, and cite in support of it *Clark v. Cammann*, 160 N. Y., 315, 54 N. E., 709; Page on Wills, section 744.

But their insistence is that Mrs. Goodwyn was next of kin under the law of distribution.

This, however, would not be true, if the will were otherwise valid—that is, valid as to its other provisions—since, in that event, if she dissented, she would be entitled to only one-third, and the remaining two-thirds would go to the heirs of William A. Goodwyn, and they would be the parties entitled to take under the statute of distribution.

Ordinarily lapsed legacies pass to the residuary legatee, if the residuary clause is general; but, when the residuary clause itself is invalid and lapses, the fund goes to the next of kin. 1 Jarman on Wills (5th Am. Ed.), 637, note, citing a large number of cases.

But suppose we treat the case as one from which the widow did not dissent from the will, and was therefore entitled, as distributee, to the entire personal estate.

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In that event she would have taken it as next of kin, and was the only party, therefore, who could insist upon the invalidity of the will, and that as to this trust property the testator died intestate.

She made no such contention. She made no claim as next of kin. Whatever rights she may have had as next of kin she refused to accept, but took instead the provisions which the will made for her. It can hardly be disputed that she had the election to do this, and that it was binding upon her representatives.

The estate, as next of kin, never vested in her. She declined to take it. It did not, therefore, need to be abandoned.

It then left, as the only question, whether the funds passed to the charity designated by the will, or passed to the next of kin (after the widow) of William A. Goodwyn.

It could never pass to her representatives, because it never vested in her.

Complainants rely upon the cases of *Mong v. Roush*, 29 W. Va., 119, 11 S. E., 906, and *State v. Holmes*, 115 Mich., 456, 73 N. W., 548, as sustaining their contention that, though Mrs. Goodwyn had not asserted any claim to the personal property, still they might do so, even after the lapse of many years.

In the case first named, a testator set apart \$2,500 to be invested by his executors, and the interest to be paid over to the trustees of the Lutheran Church in Martinsburg, Va., and by the residuary clause all the balance

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of his property was given to his widow. She lived twenty years, and made a will giving all her property to certain relatives. She never claimed the \$2,500, nor referred to it in her will.

It was held that the bequest to the church was void; and by a divided court it was held that, unless the money was given to the next of kin of the widow, it would go to the trustees individually, which no one ever contemplated.

In *State v. Holmes*, 115 Mich., 456, 73 N. W., 548, the testator gave his lands and property to his wife for life, and after her death to the State of Michigan, on condition that it would accept it, and within five years build a charitable or educational institution on the land.

The State filed a bill to construe the will, and it was held that, as the condition to build was a condition subsequent, and not to be performed within a life or lives in being, it was void.

The grandson claimed the property on the theory that testator had died intestate, and that the widow had elected, by acquiescence, to take under the will, and hence could take nothing under the void will.

It was held that the grandson took only his share, and that the widow was not estopped by her acquiescence from taking her share.

Without commenting upon the reasoning or correctness of these decisions, they are to be clearly differentiated from the present case.

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In each of these cases there was a mere acquiescence of the widow.

In neither did it appear that the widow affirmatively elected to take under the will, nor did either qualify as executrix and undertake to carry out the will.

So in each case there appears to have been mere acquiescence.

But in the present case Mrs. Goodwyn, according to the answer, deliberately renounced and declined all interest in the estate, except what the will gave her, for the very purpose of having the will executed, whether valid or void; and all in pursuance of her own and her husband's plans, purposes, and desire before his death.

She did not abandon any interest in the estate which she would have had under the statute, but declined to take any such interest, and none such ever vested in her, to be abandoned.

We are of the opinion that the right of election to take under the will or under the statute is personal to the widow, and does not pass to the representatives or heirs; and especially is this so when the widow has made her election to take under the will, and declined and refused to take under the statute. *Storrs v. St. Luke's Hospital* (Ill.), 54 N. E., 185, 72 Am. St. Rep., 211; *Deslondes v. New Orleans*, 14 La. Ann., 552; *Canon v. Apperson*, 14 Lea, 572; 2 Underhill on Wills, section 473; 11 Am. & Eng. Ency. Law (2d Ed.), 109.

We are of opinion that complainants cannot bring in question the provisions of the will of William A. Good-

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wyn, as his next of kin, because they do not occupy such relation; nor can they make such question as the next of kin of Mrs. Goodwyn, because the property never vested in her, except as the will provides, but was excluded by her renunciation and refusal to take, and the complainants are bound by such renunciation and refusal, as her representatives.

This precludes the consideration of the very interesting questions which have been so ably argued as to the validity of the trusts created by the will, and which the court of chancery appeals held to be valid.

It results that the bill of complainants must be dismissed, with costs.

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NASHVILLE SPOKE & HANDLE COMPANY v. THOMAS.

(*Nashville*. December Term, 1904.)

1. **MASTER AND SERVANT.** Evidence of such contributory negligence as shows no evidence to sustain a verdict in favor of plaintiff.

Where a servant of mature age knows the danger of a machine, and used his hand instead of an instrument furnished him for use, whereby he is injured, he is guilty of such contributory negligence as will defeat his action against the master, for personal injuries; and in such case there is no evidence to support a verdict in favor of the servant. (*Post*, pp. 459, 460.)

2. **NEW TRIALS.** Rule to govern action of trial judge on motion for, on the ground that the verdict is against the weight of testimony.

On a motion for a new trial on the ground that the verdict is against the weight of the testimony, the trial judge should carefully consider the credibility of the witnesses, and weigh the testimony to determine whether the jury was warranted in its verdict by a preponderance of evidence, and should not overrule the motion simply because there is some evidence to support the verdict. (*Post*, pp. 460-462.)

Case cited and approved: Telephone & Telegraph Co. v. Smithwick, 4 Cates, 463.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.
—J. A. CARTWRIGHT, Judge.

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W. H. WILLIAMSON, for Spoke & Handle Co.

A. B. ANDERSON, for Thomas.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This suit was instituted by the defendant in error to recover of the plaintiff in error damages for a personal injury sustained by him. The declaration alleges that the relation of master and servant existed between these parties, and that the defendant in error was inexperienced in the work that he was set to do, and that, as the result of the master's failure to properly warn and instruct him with regard thereto, he received the injury complained of. At the time the accident occurred, the defendant in error was removing shavings from the rear of a lathe machine, which had accumulated from the operation of that machine. These shavings were made by knives revolving within the machine coming in contact with pieces of timber introduced by the operator. In front these knives were exposed to view. The top and rear of the machine, however, were covered so that one standing at the back could not see the knives on the inside.

The record shows that the defendant in error was a man over fifty years of age. He had gone to work in the shop where this machine was placed about seven o'clock in the morning, and for an hour or more thereafter was engaged in operating a saw which cut and

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prepared the sticks of timber for the lathe machine. He was taken at the end of that time from this saw, and put to removing the shavings which collected back of the lathe machine. To carry on his work, a scoop was given him, with which he was expected to gather up the shavings and place them in a wheelbarrow for removal. He was thus engaged for several hours, when he was directed, as he says, to press the accumulated pile down from the machine, and, instead of using the scoop, undertook to do this with his hands. In the act of pressing down the pile, his left hand came in contact with the knives revolving on the inside, with the result that he lost a portion of the fingers of the left hand. In his testimony, the defendant in error says that he had been on both sides of the machine, that he knew that it had saws or knives on the inside that were used for the purpose of cutting the sticks of timber that were introduced by the operator, and that he had noticed that there was a cover over this machine to keep the shavings from flying away.

Upon these facts, we think the assignment of error that there was no evidence to sustain the verdict in favor of the plaintiff in the court below is well taken.

Independent of this ground for reversal, we would feel bound to set aside the judgment and remand the case because of a failure in the court below to apply a well-settled rule which should control the circuit judge in disposing of a motion for a new trial where the ground is, as in the present case, that the verdict of the

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jury is against the weight of the testimony. When this ground was pressed upon the trial judge, he overruled the motion because he found, as stated by him, some evidence to support the verdict. In other words, he applied the rule enforced in common-law actions in all appellate courts—that, when the judgment of the lower court is challenged upon the ground that the verdict is without evidence to support it, the objection will be overruled when the court of last resort finds some material testimony in the record upon which the finding of the jury can rest. This rule has been adopted from the consideration that the trial judge has heard the testimony submitted in the course of the trial, has seen the demeanor of the witnesses, and upon the motion for a new trial has carefully reviewed the case, and come to the conclusion that the jury were warranted, by a preponderance of the evidence, in reaching their verdict. Unless this duty is performed by the trial judge, it will be readily seen that great injustice may be done to an unsuccessful but worthy litigant. The appellate court, by a long-established rule, is shut off from an examination as to the credibility of witnesses and from a weighing of the testimony in order to see where the right is upon an issue of fact; and, if this service is not rendered by the trial judge, then irremediable wrong may result. The necessity for the discharge of this duty by the lower courts has been frequently emphasized by opinions delivered by this court, and the philosophy of the rule which gives so much sanction to the judgment

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of these courts has been recently stated in an opinion delivered by Neil, J., in the case of *Cumberland Telephone & Telegraph Co. v. Smithwick*, 4 Cates, 463, 79 S. W., 803.

For these reasons, the judgment in this case is reversed, and the cause remanded for a new trial.

HITE v. Rayburn.

HITE v. RAYBURN.

(Nashville. December Term, 1904.)

1. **APPEAL BOND.** Surety on, liable for costs adjudged against principal to amount of bond.

A surety on an appeal bond in a case appealed from a justice of the peace to the circuit court is bound for all costs that may, at any time in the progress of the cause, be adjudged against his principal, to the extent of the penalty of the bond, but for no greater amount.

Code cited and construed: Sec. 4935 (S.); sec. 3918 (M. & V.); sec. 3196a (T. & S.).

2. **COSTS.** In cases not controlled by statute may be equitably apportioned by court.

In the cases specially provided for in part 3, title 1, chap. 15, art. 2, of Shannon's Code, the costs must be taxed as there laid down; but in cases not otherwise provided for in said article, the court may, under sections 4961, 4962 thereof, make an equitable and fair distribution of costs between the respective parties.

Code cited and construed: Secs. 4938-4962 (S.); secs. 3921-3945 (M. & V.); secs. 3197-3220 (T. & S. and 1858).

Cases cited and approved: Schoonover v. Stillman, 3 Shann. Tenn. Cas., 574; Justices of Greene Co. v. Graham, 6 Baxt., 77.

3. **SAME.** Same. Case in judgment.

The defendant below had a perfect defense under the statute of limitations, which he pleaded and relied upon, but instead of being content with this, went outside of the issue and introduced papers into the record that had no real bearing upon the controversy.

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Held: That these papers bear such a proportion in bulk to the entire record that he should be taxed with one-half of all the costs of the supreme court and the court below.

See citations under headnote 2.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County.—LYTTON TAYLOR, Special Judge.

PARKS & BELL, for Hite.

WALTER STOKES, for Rayburn.

MR. JUSTICE NEIL delivered the opinion of the Court.

This case was before us at a former day of the term, and was then considered and disposed of on the merits of the controversy. It is now before us again on the question of costs.

1. We are of the opinion that the surety on the appeal bond executed before the justice of the peace for appeal to the circuit court was bound for all of the costs that might at any time during the progress of the cause be adjudged against his principal, to the extent of the penalty of the bond, but for no larger amount. Shannon's Code, section 4935.

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2. We are of the opinion that the costs of this court and the court below should be equally divided.

The general rule is that, in a case at law, costs follow the judgment. Shannon's Code, section 4938. But in section 4961 it is provided: "The law of costs shall be construed remedially and not as the penal law." And by section 4962 it is provided: "If any case shall occur not directly or by fair implication embraced in the express provisions of the law, the court may make such disposition of the costs as, in its sound discretion, may seem right."

Under the latter section, the court divided the costs in the case of *Schoonover v. Stillman*, 3 Tenn. Cas., 574. In that case Stillman properly recovered on several notes, but improperly upon one; all having been sued upon in the same action. In this court it was held that the judgment should be reversed unless Stillman would remit the amount recovered by him upon the latter note. He did remit, and thereupon this court divided the costs of appeal. In *Justices of Greene County v. Graham*, 6 Baxt., 77, 82, the successful party was, under the section last above quoted, taxed with the costs of witnesses which he offered to produce to prove facts already established by the testimony of other witnesses, and called at his instance, and whose examination the court for this reason declined to hear. In this latter case the court said: "We do not find that this state of facts is provided for, either expressly or by fair implication, and

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hence that it belongs to the class of cases which by section 3220 (Shannon's Code, section 4962) of the Code are to be disposed of by the court in its sound discretion. The judge has exercised his discretion in taxing the costs of the five witnesses to the plaintiffs, and we cannot say that his discretion was not properly exercised."

Of course, in the cases specially provided for under the sections of the Code embraced in the article referred to (article 2 of chapter 15, tit. 1, pt. 3, of the Code), the costs must be taxed as there laid down; but sections 4961 and 4962 recognize the fact that cases may arise, other than those in terms provided for, wherein the guiding principle should be an equitable and fair distribution of the burdens of the litigation between the respective parties.

In the present case the defendant below had a perfect defense under the statute of limitations of six years, which he pleaded and was relying upon. Instead of being content with this, he went outside of the issue, and introduced papers into the record which had no real bearing upon the controversy. These papers bear such proportion in bulk to the entire record as that we think a fair disposition of the matter would require that the plaintiff in error should be taxed with half of all the costs both of this court and the court below.

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BETTY FORD *et al.* v. H. C. BROWN & Co. *et al.*

(*Nashville*. December Term, 1904.)

1. **BILLS AND NOTES.** Purchaser of time certificates of deposit in name of one as trustee acquires no title against the beneficiary, where such trustee had no power to dispose of them, when,

Interest bearing certificates of deposit, with a definite time of maturity, not subject to check, issued by a bank to one as trustee simply, or to one as trustee for a certain named person, and so indorsed by him sometime before maturity, operate as actual notice or knowledge to the indorsee and the subsequent purchaser from such indorsee in due course of trade that such certificates represent and constitute trust funds, and they must inquire into the power of disposition of the trustee; and where such certificates were so indorsed by the trustee in payment of his gambling debt, without authority from the beneficiary to dispose of them in this manner or otherwise, the purchaser thereof from such indorsee without personal knowledge is nevertheless chargeable with actual knowledge, and acquires no title as against the beneficiary.

Acts cited and construed: Negotiable Instruments Law (Acts 1899, ch. 94), sec. 56.

Cases cited and approved: *Alexander v. Alderson*, 7 Bax., 403; *Covington v. Anderson*, 16 Lea, 310; *Caulkins v. Gaslight Co.*, 85 Tenn., 684; *Bank v. Looney*, 99 Tenn., 278; *Bank v. Butler*, 5 Cates, 574; *Fox v. Bank* (Tenn. Chy. App.), 35 L. R. A., 678; *Duncan v. Jordan*, 15 Wall., 175; *Swift v. Smith*, 102 U. S., 442; *Bank v. Lange*, 51 Md. 138; *Shaw v. Spencer*, 100 Mass., 382; *Cohnfeld v. Tannenbaum*, 176 N. Y., —; *Hazeltine v. Keenan*, 54 W. Va., 600.

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2. **SAME.** Same. Facts overlooked by purchaser will not relieve him of consequences.

The fact that the purchaser of the time certificates of deposit overlooked the fact that they were such, and paid cash for them will not relieve him of responsibility as to any notice they themselves give. (*Post*, pp. 471, 472, 481, 482.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

JOHN RUHM, for complainants.

WHEELER & TRIMBLE, for Chattanooga Savings Bank.

JAS. A. RYAN, for H. C. Brown & Co.

WALTER STOKES, for First National Bank.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

Complainant exhibited this bill against the defendants, Henry C. Brown, Fred Laitenberger and Jesse Trinum, as individuals, and as a partnership using the firm name of H. C. Brown & Co., against the First National Bank of Nashville, Tennessee, and the Chattanooga Savings Bank. The principal object of the bill was to enjoin the Chattanooga Savings Bank against the payment of two certificates of deposit which that

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bank had issued to Woodworth as trustee for complainant, Betty Ford, and which certificates of deposit had been indorsed and transferred by Woodworth to H. C. Brown & Co., in payment of a gambling indebtedness. H. C. Brown & Co. indorsed said certificates of deposit to the First National Bank of Nashville and that bank had forwarded the certificates to Chattanooga, and was seeking to collect them from the Chattanooga Savings Bank at the time the original bill herein was filed. It is alleged that these two certificates of deposit represented the earnings of the complainant, Betty Ford, as a domestic in the family of D. Woodworth, Jr., of Chattanooga, during a period of eighteen or twenty years. D. Woodworth, Jr., had died and the certificates of deposit, which had been issued to him, were changed and issued in the name of C. N. Woodworth, trustee. These certificates of deposit were as follows:

"Chattanooga Savings Bank.

"13493. Chattanooga, Tenn., Oct. 7, 1902.

"C. N. Woodworth, trustee, has deposited in this bank \$994.97, payable to the order of same, twelve months after date, with interest to maturity only at the rate of four and one-half per cent. per annum, upon the return of this certificate properly indorsed. Not subject to check.

"R. W. BARR, Cashier."

"Chattanooga Savings Bank.

"No. 13704. Chattanooga, Tenn., March 21, 1903.

"C. N. Woodworth, trustee for Betty Ford, has de-

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posited in this bank thirteen hundred and seventy-five and fifty-five one-hundredths dollars (\$1375.55), payable to the order of same twelve months after date, with interest to maturity only at the rate of four and one-half per cent. per annum upon the return of this certificate properly indorsed. Not subject to check.

"R. W. BARR, Cashier."

The Chattanooga Savings Bank answered the bill and averred that it had issued the certificates, but had refused to pay the same, because they were not due and because it had received notice from Betty Ford not to pay them; that it had no interest in the controversy, but was willing to pay the certificates to whomsoever the court might adjudicate they should belong.

The defendants, H. C. Brown & Co., also answered the bill denying all of its material allegations.

The First National Bank of Nashville also answered denying all knowledge upon its part of the gambling transactions, and all knowledge of the relations between Woodworth and Betty Ford, and denied any knowledge that its codefendants had conducted any gambling establishment or rooms; denied all knowledge of the intoxication of Woodworth or of his transaction with H. C. Brown & Co. with regard to said certificates. It admitted, however, that on April 24, 1903, these certificates of deposit were presented by H. C. Brown & Co. to the First National Bank at Nashville for discount, and avers that it purchased said certificates from H. C. Brown & Co., and paid their face value in cash, and

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then sent the certificates to Chattanooga for collection. It avers that it took these certificates in due course of trade for a valuable consideration and without any notice of the rights and equities of Betty Ford or of anyone else, and avers that it is an innocent holder for value in due course of trade and without notice.

The court of chancery appeals finds that O. N. Woodworth, having possession of these certificates, brought them to Nashville, Tennessee, and on or about the 22nd or 23rd, or possibly the 24th or 25th of April, 1903, he went to the gambling-house located over the Climax saloon on Cherry street, in Nashville, Tennessee, and there engaged in gambling. It is shown he drank heavily and lost large sums. While thus drinking and gambling he not only lost a large amount of his own money, but he also indorsed and transferred these certificates of deposit belonging to the complainant, upon which he obtained money and chips to be used in gambling. He lost and gambled away all of the money and chips so obtained except about the sum of six or seven hundred dollars, which the gamblers in charge of the place offered to repay him, but which he at the time declined.

That court further finds that H. C. Brown & Co. came into possession of these certificates, and on the 25th of April, 1903, took them to the First National Bank of Nashville, and there sold and disposed of them to the First National Bank for cash. The bank, overlooking the fact that the certificates were not due, took them for cash, as H. C. Brown & Co. were among their regu-

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lar customers. They paid cash for them and sent them to Chattanooga through their correspondent at that place for collection. In the meantime C. N. Woodworth, having become to some extent rational, telegraphed the Chattanooga Savings Bank at Chattanooga not to pay these certificates. The bank at once notified the mother of C. N. Woodworth and Betty Ford, who immediately advised the bank not to pay or recognize these certificates.

It further appears that when these certificates were first presented to the First National Bank they bore the indorsement of complainant C. N. Woodworth and the indorsement of H. C. Brown & Co., but at that time the First National Bank refused to take the certificates because one of them was not properly indorsed, that is to say, it was simply indorsed by C. N. Woodworth, when it should have been indorsed as it was payable on its face, by "C. N. Woodworth, Trustee for Betty Ford." Thereupon H. C. Brown & Co. took the certificates back and returned with them in a short time properly indorsed.

The court of chancery appeals finds as a matter of fact that this new indorsement was made by C. N. Woodworth. After the indorsement was corrected the certificates were taken back to the First National Bank and on the 25th of April, the teller of the bank bought the certificates in question from H. C. Brown or H. C. Brown & Co., paying cash therefor, overlooking the fact that the certificates were not due. The officers of the

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First National Bank denied all knowledge as to how H. C. Brown & Co. acquired these certificates and all knowledge of the transaction between Woodworth and H. C. Brown & Co. and their employees, or of any person who obtained these certificates of C. N. Woodworth, and the court of chancery appeals finds there is nothing in the record to indicate that these officers had any knowledge of the transactions mentioned.

The court of chancery appeals further finds there is no evidence in the record from which we are justified in finding that the officers of the bank had any knowledge in regard to the gambling carried on over the Climax saloon.

The court of chancery appeals finds that H. C. Brown & Co. were affected with full notice, and had knowledge of this embezzlement on the part of Mr. Woodworth and of this violation of his trust, and had full knowledge of his want of legal right and capacity to transfer this property. They must have known and did know that they were taking the certificates in violation of this trust and taking funds which Woodworth was practically embezzling. As to the First National Bank, there is no proof to show that the officers of the bank had any knowledge of these transactions, or even that H. C. Brown & Co. conducted gambling rooms over the Climax saloon, and hence the rights of the First National Bank must depend upon the facts disclosed upon the face of the paper itself and the indorsements thereon.

As already stated, one of these certificates was paya-

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ble to C. N. Woodworth, trustee for Betty Ford, and the other simply to C. N. Woodworth, trustee. One of them was dated March 21, 1903, due twelve months after date, and the other was dated October 7, 1902, and due twelve months after that date. Each of them bear interest to maturity only at the rate of four and one-half per cent per annum. It is disclosed on the face of each certificate that it is not subject to check, but is an interest bearing certificate of deposit. The first certificate, which was made payable to C. N. Woodworth, trustee, for Betty Ford, was indorsed by C. N. Woodworth, trustee, and afterwards the words, "for Betty Ford," were added by him. The other certificate was simply indorsed by C. N. Woodworth, trustee.

That court further finds that these certificates were sold and transferred by H. C. Brown to the First National Bank of Nashville on the 25th day of April, 1903. On the 24th of April, 1903, at 7:45 a. m., C. N. Woodworth had telegraphed the cashier of the Chattanooga Savings Bank, which had issued these certificates not to pay them. So, when the certificates were sent to Chattanooga for collection, the Chattanooga Savings Bank refused to pay them on the ground that they were not due and on the further ground that Betty Ford contested the right of the First National Bank to them. It appears, therefore, that before the First National Bank took these certificates, all the authority which C. N. Woodworth had, if any, to transfer them had been revoked by Mrs. Ford. It does not, of course appear that

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he ever had authority to transfer them, especially for his own benefit.

The court of chancery appeals was of opinion that these certificates not being due and being made payable to C. N. Woodworth, trustee, in the one instance, and to C. N. Woodworth, trustee for Betty Ford, in the other, and so indorsed, destroyed the negotiability of the paper to the extent of giving notice that they constituted trust funds and that the purchaser must inquire into the right of the trustee to dispose of them. ✓

We have no doubt of the correctness of the conclusion of law reached by the court of chancery appeals upon the predicate of facts found by them.

In the case of *Bank v. Looney*, 99 Tenn., 278, this question was considered by this court, and it was said by the chief justice, who delivered the opinion, that in a controversy between a beneficiary of a trust fund and the holder of a paper disposed of by a trustee in violation of his trust, the word "trustee," appearing upon the face of the paper, is sufficient to put any taker upon notice. The court in that case [on page 291] referred to the authority of *Duncan v. Jordan*, 15 Wall., 175, in which it was held that the word "trustee" gave notice of the existence of a trust and that the party taking the paper was charged with the duty of ascertaining what, if any, restrictions were imposed upon the trustee.

The court also cited the case of *Third National Bank of Baltimore v. Lange*, 51 Md., 138.

This court further remarked that "The correctness of

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these holdings is now conceded by the court with practical unanimity. The effect of them is that, if the trustee, Sykes, disposed of this paper in violation of his trust, then the word "trustee" would convert anyone who so obtained it into a constructive trustee, at the instance of the *cestui que trust*."

To the same effect is *Fox v. Bank*, decided by the court of chancery appeals, and reported in 35 L. R. A., 678, in which Judge Wilson stated as follows: "In the contest between the beneficiary of these notes (assuming that Anderson was not their real owner) and the transferee of Anderson, the fact that the notes, on their face, appeared to be payable to him as trustee would put the transferee on notice and the claims of the beneficiaries would be superior." *Alexander v. Alderson*, 7 Bax., 403; *Covington v. Anderson*, 16 Lea, 310; *Caulkins v. Gaslight Co.*, 85 Tenn., 684.

It is insisted, however, on behalf of the appellants that the rule announced in *Bank v. Looney*, 99 Tenn., 278, and the other Tennessee cases, on this subject, has been modified and entirely superseded by what is known as the Negotiable Instruments Law, which provides in section 56 as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

This section of the Negotiable Instruments Law was

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construed by this court in the case of *Unaka National Bank v. Butler*, 5 Cates, 574, 83 S. W., 655. The court held that the effect of this section of the statute was to embody the majority rule upon the subject of notice as it has been held and administered by the courts of New York and other States and the federal courts for many years and to discard the doctrine of constructive notice which had prevailed for many years in this State. The rule as administered in this State was that, if a purchaser of negotiable paper had implied notice of prior equities or infirmities of any nature whatever in the title of the holder from whom he purchased (that is, if anything appeared upon the face of the paper or from the facts and circumstances attending its possession or sale, which would put one of ordinary prudence upon inquiry that would lead to actual knowledge of the equities or infirmities), he was bound to pursue such inquiries and was charged with notice of the facts he could have learned. Citing the Tennessee cases on the subject.

It is then stated in the opinion that the rule of constructive or implied notice had been abrogated by the Negotiable Instruments Law, enacted in April, 1899; and what may be called the majority rule was adopted by the enactment of section 56, which has already been quoted.

It will be observed that this section provides that a party "must have had actual knowledge of the infirmity

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or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In *Unaka Bank v. Butler*, 5 Cates, 574, the court was dealing with a check which did not carry on its face any notice of defective title, but notice of the infirmity was sought to be fixed by the surrounding facts and circumstances. It will be observed that, in the present case, each of these certificates of deposit was indorsed by C. N. Woodworth as trustee and we are of opinion that such an indorsement *prima facie* and presumptively fixed the purchaser with actual knowledge of want of authority in the trustee to dispose of the paper for his own benefit.

In *Third National Bank v. Lange*, 51 Md., 138, the note was payable to a trustee and indorsed in the same style by the trustee. The court said: "In the case of the present note, it cannot be read understandingly without seeing on its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank before purchasing to have made inquiry into the rights of the trustee to dispose of it. This it wholly failed to do and, as it turned out, he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed."

In *Shaw v. Spencer*, 100 Mass., 382, the court in speaking of the effect of the word "trustee," says it means trustee for someone whose name is not disclosed and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the prop-

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erty of an unnamed *cestui que trust*, than the property of one who is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word "trustee" alone has no meaning or legal effect.

It has already been seen that one of the certificates of deposit in the case at bar was payable to C. N. Woodworth, trustee for Betty Ford, and indorsed in the same style, but actual notice to a purchaser of the fiduciary character of a paper is no more effective in the one case than in the other.

In the case of *Swift v. Smith*, 102 U. S., 442, it is said: "There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note nor anything in the indorsement thereon to notify him that it did not belong to Jackson both legally and equitably. It was a mercantile paper and not due. . . . It is true that, if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner and its purchase will not be held to be *bona fide*."

These authorities sustain our position that the word, "trustee," in an indorsement of this character, is express notice to a purchaser that there is a *cestui que trust* or beneficiary, and that his rights may not be sacrificed by the trustee in the sale or pledge of the note for his own

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benefit. In other words, our holding distinctly is that such an indorsement is actual knowledge to the purchaser of such paper within the meaning of section 56 of the Negotiable Instruments Law, *supra*.

Now, it is very true, as said by Mr. Perry in his work on Trusts, vol. 1, sec. 225: "The mere fact that the word "trustee" is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But, if a purchaser takes securities from a trustee, with the word "trustee" upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the purchaser may be held as trustee."

As stated in *Bank v. Looney*, 99 Tenn., 278, *supra*, the rule is that he who takes a security from a trustee with the fiduciary character displayed upon its face, is bound to inquire of his right to dispose of it, but if upon inquiry it is found that there is no restriction upon the trustee's power of disposition, or it may be added, there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith for value and before maturity will be protected.

It appears that our Negotiable Instruments Law is a substantial reproduction of a similar law enacted by the State of New York in the year 1896. In the year 1903 with that law on the statute books, the court of appeals

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of New York decided the case of *Cohnfeld v. Tannenbaum*, reported in 176 New York reports. The court said, in the midst of the opinion, the signature to the check, "Isidore Cohnfeld, guardian," gave the defendant notice that presumptively the funds being paid to him were not those either of the Cohnfeld Manufacturing Co., or of Isidore Cohnfeld personally, and he was put on inquiry to ascertain the authority of Cohnfeld to apply the money in payment of the company's debts. This proposition is conceded by both the courts below. Had he made the inquiry, he would have learned the facts which have already been stated. He is, therefore, chargeable with all that those facts import or which is fairly to be inferred from them.

Again in West Virginia, where a Negotiable Instrument Law similar to our own prevails, the supreme court of that State, held, in the case of *Hazeltine v. Keenan*, 54 W. Va., 600, that a negotiable note, payable on its face to a payee, with the word "attorney" suffixed to his name, indicates an interest in other parties and puts the purchaser upon inquiry as to their rights and the right of the payee to sell the note.

In addition to all this the certificates show on their face that they bear interest to maturity only at the rate of four and one-half per cent per annum, and further that they are not subject to check, but are interest bearing certificates of deposit. It further appears that they are time certificates of deposit, one of them having al-

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most twelve months to run, and the other six months, at the time they were transferred. It is admitted by the officers of the First National Bank that they overlooked this fact when they bought these certificates for cash, but we agree with the court of chancery appeals that the fact that the bank overlooked these things will not relieve them of responsibility as to any notice the paper itself gives.

All these facts disclosed on the face of the paper, including the express indorsement of O. N. Woodworth, trustee, etc., gave actual notice to the bank that this paper represented a trust fund and obliged the bank to inquire into the right of the trustee to dispose of it. If the bank had made such inquiry it could easily have ascertained that the paper had been embezzled and the money lost in a gambling transaction by the trustee; and further the bank would have discovered that, before the paper had been purchased by it, all right and authority of the trustee to act had been withdrawn.

We are therefore of opinion that the indorsements and recitals of these certificates communicated actual knowledge to the bank that they represented a trust fund and, even under the Negotiable Instruments Act, no title was acquired by the bank to the paper.

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(Nashville. December Term, 1904.)

1. **CHARGE OF COURT.** Request for further instructions containing an untrue statement as to the testimony is properly rejected.

Request for further instructions containing a statement that a certain witness gave in testimony a certain fact or statement when, as a matter of fact, such witness did not so testify, is vicious and should not be charged, and its rejection is proper. (*Post*, pp. 496, 497.)

2. **EVIDENCE.** Accusations and statements denied are inadmissible.

When an accusation or statement, made in the presence and hearing of the party, is denied, it is not admissible at all as an evidential fact, and has no probative effect whatever. (*Post*, pp. 497-507, and especially p. 505.)

Cases cited and approved: *Kendrick v. State*, 9 Hum., 723; *Deathridge v. State*, 1 Sneed, 80; *Low v. State*, 108 Tenn., 127, 128; *Commonwealth v. Kenney*, 12 Metc. (Mass.), —.

3. **SAME.** Accusations and statements not denied are admissible, when.

When an accusation or statement is made in the presence or hearing of the party, and he stands mute in the face of the charge, that fact is interpreted as a circumstance tending to show guilt, provided he heard and understood the charge, and the situation of the parties demanded a denial, all of which must be left to the determination of the jury. (*Post*, pp., 497-507, and especially, p. 505.)

Cases cited and approved: *Kendrick v. State*, 9 Hum., 723; *Daugherty v. Marcum*, 3 Head, 323; *Queener v. Morrow*, 1 Cold., 123, 129, 130; *Green v. State*, 27 Tenn., 50, 62-66.

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4. **SAME.** Of silent acquiescence is of a dangerous character and must be received with great caution.

The evidence of silent acquiescence in accusations and statements, made in the presence and hearing of a party, is of a dangerous character, and must be received with great caution. (*Post*, pp. 497-507, and especially, p. 505.)

Cases cited and approved: *Queener v. Morrow*, 1 Cold., 123, 129, 130; *Green v. State*, 97 Tenn., 50, 62-66.

5. **CHARGE OF COURT.** Refusal of request for instructions as to weight of evidence of undenied accusations and statements is reversible error, when.

The refusal to charge a request for further instructions, properly applicable to the facts, to the effect that an accusation or statement made in the presence and hearing of the defendant, if allowed to pass unchallenged, can only be looked to as a circumstance tending to show the guilt of defendant, and, as such is entitled only to such weight as the jury might give it, in view of all the proof in the case, is prejudicial to the defendant and is reversible error. (*Post*, pp. 497-507, and especially, p. 506.)

Cases cited and approved: *Kendrick v. State*, 9 Hum., 723; *Daugherty v. Marcum*, 3 Head, 323; *Queener v. Morrow*, 1 Cold., 123, 129, 130; *Green v. State*, 97 Tenn., 50, 62-66.

6. **SAME.** Same. Refusal of request that jury should consider whether, under all the circumstances, a denial of accusations or statements was demanded, is reversible error, when.

Refusal to charge the request for further instructions, properly applicable to the facts, to the effect that if the statement was made in the presence of the defendant, and he failed to make any response thereto, then the jury should consider whether, under all the surrounding circumstances, considering the grief and distress of his daughter, who was the wife of the deceased, the denial of her statement was demanded, is reversible error. (*Post*, pp. 497-507, and especially, p. 507.)

Cases cited and approved: *Queener v. Morrow*, 1 Cold., 123, 129, 130; *Green v. State*, 97 Tenn., 50, 62-66.

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7. **SAME.** Refusal of request not applicable to the facts is proper. A request for further instructions not applicable to any facts in evidence is properly refused. (*Post*, p. 506.)
8. **SAME.** That proof of good character would strengthen the presumption of defendant's innocence should be given, when.

Where a defendant on trial for an offense proves a good character, the court should instruct the jury that proof of good character would strengthen the presumption of defendant's innocence; but a failure to give such instructions, in the absence of a special request therefor, is not reversible error. (*Post*, p. 507.)

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson County.—W. M. HART, Judge.

J. M. ANDERSON and ROBT. VAUGHN, for Phelan.

ATTORNEY-GENERAL CATES, K. T. MCCONNICO and J. H. ZARECOR, for the State.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The plaintiff in error was convicted in the criminal court of Davidson county of murder in the second degree for the killing of R. T. Townes, and his punishment fixed by the jury at confinement in the State prison for a period of ten years. He has appealed in error.

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The record reveals that deceased and defendant were men over sixty years of age. The deceased Townes was the son-in-law of defendant Phelan, having married the daughter of the latter about two years before the homicide. The deceased at that time was about sixty-four years of age and the daughter of defendant only about twenty-four years of age. On account of the disparity in their ages, the defendant and probably his family objected to the marriage, but it was consummated despite their opposition. It appears, however, that all the domestic differences growing out of this union had become reconciled, so that, in January, 1904, the defendant, upon the invitation of deceased and his wife, moved his family into the home of deceased, where the two families resided up to the time of this tragedy. The deceased had owned this farm for twenty-five years prior to his marriage with defendant's daughter, but before defendant and his family came to live upon the place, the deceased had conveyed the farm to his wife, the daughter of the defendant. This conveyance was made in March, 1903, a few months prior to the institution of a damage suit against Townes by one J. B. Jones.

The defendant is shown to have been a man of excellent character, his neighbors testifying with singular unanimity to his reputation as a truthful and peaceable man. It appears that for some time after defendant took up his residence at the home of his son-in-law, the relations existing between the families were most harmonious. It is probable from this record that the en-

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mity between the parties grew out of a business transaction, when some timber ties were hauled by Jim Phelan, son of defendant, from the place to the city of Nashville to be sold, and in dividing the proceeds of the sale, the parties differed in their respective calculations. It turned out that the calculation made by deceased was correct, whereupon defendant acknowledged his mistake and paid over to Townes the sum in dispute, to wit, \$3.75. Deceased did not seem satisfied and manifested a special unfriendliness to Jim Phelan, who, on account thereof, finally left the place and established a home elsewhere.

Another cause of disturbance in this family was a remark Mrs. Phelan overheard the deceased make to his wife, to the effect that she was furnishing more than her share of the provisions. It appears that each family had been furnishing their own provisions and all of them would eat together at Mr. Phelan's table. After this remark, the families established their own kitchen and dining room and maintained separate housekeeping.

There is also proof tending to show that another cause of unpleasantness was the intemperance at times of the deceased, who frequently drank too much on visiting the city and when he returned home at night would become disagreeable to his family. The defendant testifies that on two occasions, Mrs. Townes ran screaming from her husband's room to her parents' room at night, saying that her husband was going to kill her and asking protection. There is proof also tending to show that on one

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occasion the deceased fired off his pistol while in the house, probably while under the influence of liquor. The defendant also testified that on another occasion he had been notified by his daughter that her husband, the deceased, had become angry with her while they were on a visit near Mt. Juliet and had kicked her.

The record also reveals that, after these antagonisms arose, defendant contemplated moving his family away and made one or two ineffectual efforts to rent another house. There was also proof on behalf of the State tending to show that during this time the defendant expressed unfriendliness to the deceased, complaining that he could stand as much as he could stand, and to one H. B. Carter, on the day before the killing, stated that he had a notion two or three times of killing deceased. Witness said to defendant, "Don't do that." Defendant replied, "I won't say that I will. I have tried to get him to fight me." Witness advised defendant, if he could not get along with him, to get off the place. Defendant replied, "We did think of moving down to a little place across the road," but added, "Annie," (his daughter) "wants me to stay here to protect her." Another witness testified that defendant told him about the trouble he was having in getting along with the deceased and finally said to witness, "About the only way I can get along with Bob (the deceased) is to take a double barrel gun and blow his head off his shoulders." In this same conversation defendant said to witness that deceased, on one occasion, had gone into his room, closed

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the door and fired off his gun. Defendant asked the witness, "Ain't that threats?" I think that's threats. Ain't that threats?" Defendant then asked the witness if he thought deceased had shot off his gun to terrorize defendant's family, remarking, "If he's doing it for that, I'll not take it off of him. I'll shoot his head off."

These latter threats are proven by one Tom Williams, a negro, and they seem to have been made while defendant was laboring under some excitement from either real or imaginary insults heaped upon him or his family by deceased. Further it appears that while defendant protested he was not afraid of deceased, he yet manifested great uneasiness lest deceased should do him or his family some hurt. This is shown by the following evidence:

Tom Williams (colored), on cross-examination, deposed as follows:

"Q. You say the first time Mr. Phelan was down at your house talking with Mr. Townes, he asked you how you got along with him? A. Yes, sir.

"Q. And then he said he believed Mr. Townes was going to kill him or some member of his family? A. Yes, sir, he asked me somehow or another in that direction.

"Q. It was along that line? A. Yes sir.

"Q. And before he shall do it, I will get my gun and shoot him? A. 'Blow his head off.' He seemed to be uneasy or afraid or badly scared.

"Q. When he first came down there he seemed to be uneasy and frightened? A. Yes, sir.

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"Q. And asked how you got along? A. Yes, sir.

"Q. And said he could not get along, and believed he intended to hurt him and his family? A. Yes, sir.

"Q. And before he would permit him to hurt them, he would take his gun and shoot him? A. Take his gun and blow his head off his shoulders.

"Q. That was in the same connection in which he told you he was afraid he would hurt him or some member of his family? A. Yes, sir."

Witness Carter testified that Phelan said he had a notion of shooting Townes, and that Carter said to him: "I would not do that."

"Q. And when you said, 'I wouldn't do that if I was you,' what was it he said? A. I didn't mean to say that I will."

The next witness on the alleged threats was Alex. Hines, who testified as follows:

"Q. What, if anything, did he say he (Phelan) was going to make. A. As well as I remember, he said he was going to make his crop there—that he had went there for that business, and was going to tend to that business, and was going to stay there and make his crop.

"Q. Now, what was it, as near as you recall? A. The best I recall he said he was going to make his crop, no matter what the consequences were."

The tragedy occurred late in the afternoon of June 24, 1904. There were no eyewitnesses excepting the immediate participants and Miss Mamie Phelan, the daughter of the defendant.

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An incident immediately preceding the killing and which is supposed to have infuriated the deceased is detailed by Enoch Phelan, a son of the defendant. According to the testimony of this witness, on that afternoon he and George Hunter, a young employee on the place, had been gathering fruit preparatory to coming to Nashville to sell it and had taken the ladder from the barn to the orchard and had left it there. About six o'clock the deceased went to the barn for the purpose of feeding his stock and, discovering that the ladder was not in the barn, he became very angry. Enoch Phelan testifies that he was in his mother's room reading the paper when the deceased came around from the barn, cursing and complaining that the ladder was not at the barn and hence he could not get up there to feed his horses. Enoch got up and explained to deceased how he came to leave the ladder in the orchard, telling him he would go after it. While this witness was at the orchard, procuring the ladder, the killing occurred. At this time the defendant was seated on the back porch of the Phelan home leaning against the hall door. This back porch is ten feet long and ten feet wide. Defendant testifies that he tried to pacify deceased about the ladder, telling him he would make a new ladder for them to gather fruit with and would not bother the ladder any more. The deceased, in an angry mood, passed over this little back porch through the dining-room into his bedroom, distant about six or seven steps from where the defendant was sitting. The defendant testified that he heard his daugh-

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ter exclaim, "Mr. Townes, every time you get mad, you come in here for your whiskey bottle and then for your pistol." To which he replied, "What in hell have you got to do with it?" Defendant states that his daughter then made an outcry, saying, "Don't, Mr. Townes. You hurt." That she was making a gurgling noise as if being choked. In this defendant is corroborated by his daughter, Miss Mamie Phelan, who at the time was in the back yard and claims to have seen through the dining room window, near which she was standing, the deceased choking her sister; saw her scuffling to get away from him and heard her scream repeatedly, and saw her running from where she was being choked through the dining-room out to the little porch where the defendant was seated. The defendant exclaimed, "Bob, I can't stand everything." To which deceased replied, "By G—, you will stand it and more too," and immediately came out through the dining room towards the little back porch with his pistol in his hand, as testified to by defendant, Miss Mamie Phelan and Miss Willie Phelan: Defendant immediately arose, went to his room, procured his double barreled shotgun and stepped from the porch into the back yard just as Townes came out on the porch with his pistol in his hand. Defendant with his face towards deceased continued to back twenty or twenty-five feet away, when he said, "Bob, you had better go back," and deceased replied, "By G—, I am ready for you." Deceased continued to advance with his pistol presented at defendant. Defendant had backed out into the yard

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towards the garden gate and when about forty-six feet from the porch he fired and deceased, with his pistol in his hand, fell to the ground a few feet from the back porch, in the direction of the garden gate near which defendant was standing. Deceased was shot with small bird shot, No. 6, delivered from a double-barreled shotgun. It is claimed by defendant that the other barrel was accidentally discharged and took effect in the gutting and boxing and shingles of the house.

The State introduced no witness to contradict the defendant's account of the shooting, but seeks to do so by circumstantial evidence.

The first witnesses outside the family who reached the body were W. T. Burns and his son, James Burns, who lived probably one hundred yards from the Townes house and who were attracted there by the firing. These witnesses testify that when they reached the rear of the house defendant was standing about thirty or thirty-five feet northeast of the back porch and deceased was lying on the ground about four feet from the back porch—lying on his breast with his feet towards the porch. These witnesses also testify that no pistol was seen about the body of deceased nor was the defendant's gun to be seen. The defendant explains why the gun and pistol were not seen by these witnesses. He states that immediately after the shooting, he carried the gun to the porch where his wife was standing and handed it to her. He further states that he picked up the pistol and carried it into his

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bedroom and deposited it in the corner drawer of a side-board. As a reason for putting the pistol away, defendant states that he was afraid that, in the excitement, some one might pick it up and use it on him. Defendant was further asked why he put one shell in his shotgun after the shooting and stated in reply that deceased had relatives and friends around there and he did not know but they might come in and do him some violence.

The sheriff testified that after the shooting, when he had arrested defendant and brought him to the jail, the latter told him he had left deceased's pistol on the ground. It is also true defendant did not in his testimony deny making this statement to the sheriff.

Deputy sheriff Kiger, after the shooting, went out to the Townes residence. He met Phelan on his way to Nashville, coming to surrender to the sheriff, and, after getting to the Townes home, he took charge of Townes' pistol. He was asked by the counsel for the State and replied:

"Q. Where was the gun? A. It was behind the door that leads off of the little porch into the side where Phelan was said to have lived.

"Q. You mean there, behind that door? A. Yes, sir.

"Q. Where was the pistol? A. In the top bureau drawer.

"Q. Where was it standing? A. Right there, in the corner."

He was asked by counsel for defendant as follows:

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"Q. You got it out of the bureau in Mr. Phelan's room? A. I didn't get it out myself.

"Q. Who did get it out? A. Some young man; I don't know whether it was his son or not."

Enoch Phelan, son of the defendant, testified as follows about the pistol:

"Q. Did your father make any statement to you as to the whereabouts of Mr. Townes' pistol? A. Well, when I got there, I asked him.

"Q. Did he or not tell you where the pistol was—where he had put it? A. He didn't until I asked him.

"Q. However, you asked him? A. Yes, sir, he told me.

"Q. When the officers came out that night, Mr. Kiger, Sheriff Cartwright, and others, who was it gave them the pistol? A. Myself.

"Q. Is that the pistol, or one like it? A. Yes, sir; that is Mr. Townes' pistol, and the one I gave Deputy Sheriff Kiger.

"Q. Where did you get it? A. I got it out of the sideboard, right in my mother's room, right by the side of where the gun stayed."

The Burns witnesses testify that when they reached the scene of the tragedy the wife of deceased was bending over his body crying and moaning. Witness Burns was endeavoring to console Mrs. Townes, when defendant spoke up and said, "I told Annie there was no use going on that way. I told her he was dead." Mrs. Townes replied, "Papa, there was no occasion for this."

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Defendant said, "Annie, I thought he was abusing you or choking you." Mrs. Townes replied, "No, sir, he was not doing anything of the kind." Defendant further remarked to witness, "Mr. Burns, I can't take everything. This man has abused me and I have taken his abuse as long as I can. I can't stand it no longer. You know me well enough to know I am not afraid of anybody." Mrs. Townes in that conversation also said to the defendant, "Papa, if you had not dared him out there two or three times, there wouldn't have been no harm done," or something to that effect. In the same conversation the defendant said to witness Burns that the deceased was coming at him with a pistol. The language of the witness is, "Mr. Phelan said he could not stand it. Mr. Townes was coming at him with a pistol."

Several witnesses testified that they heard no denial by defendant of the accusation of his daughter that he had called or dared deceased out of the house two or three times, nor did the defendant testify that he had denied said statement at the time it was made. He did testify, however, that he did not dare the deceased to come out of his room.

On this subject counsel for defendant requested the court to charge three several propositions. The first instruction was properly rejected, for the reason it contained a statement to the effect that the witness, James Burns, had said that defendant replied to the accusing statement of his daughter, "No, daughter, I had to kill him—he was advancing on me with a pistol at the time."

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As a matter of fact, James Burns had not so testified and for this reason it was vicious and should not have been charged.

The third request was as follows:

"The statement claimed to have been made by Mrs. Townes to the effect that the defendant invited or dared the deceased to come out of the house is not competent evidence of the fact that any such invitation or dare was made by the defendant. Such statement, if made by her, and if permitted by the defendant to pass unchallenged, is not to be received or considered in the same light that it would be entitled to be considered if Mrs. Townes had appeared upon the witness stand and testified to this; such statement, at most, can only be looked to as a circumstance tending to show the guilt of the defendant, and, as such, is entitled only to such weight as you think it is entitled under all the proof in this case.

"Refused; the law on this subject having been substantially charged. W. M. Hart." Refusal to grant this request is assigned as error.

Request No. 4:

"If, from the proof in this case, it appears that the defendant denied the statement claimed to have been made by Mrs. Townes that he (the defendant), invited the deceased, or dared the deceased, to come out of the house, or if what he said at the time in response to the statement made by Mrs. Townes, under all the circumstances of the case, in effect amounted to a denial of her statement, as aforesaid, then the court charges you that the

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statement claimed to have been made by Mrs. Townes is incompetent, and should not be considered by you as evidence for any purpose.

"Refused; the law on the subject having been substantially charged. W. M. Hart, Judge." Refusal to charge this request is assigned as error.

Request No. 5:

"If you believe, from the evidence in this case, that Mrs. Townes said, in the presence of this defendant, immediately after the shooting of her husband, 'that you ought not to have invited him out or dared him out of the house,' and that defendant failed to make any response to such statement, then you will consider whether, under all the surrounding circumstances, considering the grief and distress of Mrs. Townes at the time, and the defendant's relation to her, etc., it was natural to be expected that he would go into any discussion or make any denial of her statements at such a time, and if you believe that it would not have been natural for him under those circumstances to have gone into any discussion or make any denial of her statements, then no importance or significance can be attached to the fact that defendant made no denial of her statement.

"Refused; the law on this subject having been substantially charged. W. M. Hart, Judge." Refusal to charge this request is assigned as error.

The trial judge, as stated, declined to submit these instructions, for the reason that he had sufficiently or substantially charged them. We have carefully examined

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the charge of the court and fail to find any instructions on the weight to be given to the accusation of Mrs. Townes or how this character of testimony should be received by the jury. On the contrary, the jury were left to infer from the instructions given that the accusation of Mrs. Townes against the defendant was to be considered as direct testimony that the defendant had dared the deceased to come out of his room. In stating the theory of the State, the court said, among other things, as follows:

"That a controversy arose between the deceased and the defendant above explained, and that the defendant procured a shotgun, and then dared or invited the deceased to come out."

Again, in charging a request submitted by the State, the court said:

"If you believe from the proof that the defendant dared or invited the deceased to come out of his room, and defendant at the time had prepared himself with a loaded shotgun, and the purpose of the defendant was to provoke a difficulty with deceased for the purpose of securing an opportunity to kill deceased, and in response to his dare or invitation, deceased came out, and if when deceased appeared, defendant was in a hostile attitude toward deceased, or in the act of firing upon him, defendant's assault on deceased, under such circumstances, would not, under the law, be justifiable, and the justification of self-defense would not, under such circumstances, be available to defendant, although you may be-

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lieve that deceased appeared with a pistol in his hand at the time."

The question then presented for our determination is whether or not the supplemental requests submitted on behalf of the defendant should have been charged.

A review of the law on this subject will be useful at this point. In *Kendrick v. The State*, 9 Hum., 723, this court said:

"If a man be charged with the commission of an offense and he neither admit nor deny it; if facts in relation thereto, of which, if true, he must be cognizant, be charged in his presence and hearing to exist, and he do not controvert them, proof of such charge having been made is legitimate. But, if he deny the charge of his guilt, if he controvert the truth of the facts, proof of such charges cannot be made, because they are mere charges unsupported by oath and lack that confirmation which is supposed to be given to them by the implied admission of the person charged in not denying them."

In *Deathridge v. The State*, 1 Sneed, 80, it appeared that certain persons had accused the prisoner in his presence, saying that he had sent for them and advised them that, "a good haul could be made." This charge the prisoner denied, yet it was permitted to go in evidence against him. The court adjudged this to be error, saying:

"If the prisoner had remained silent under the charge it was competent to go to the jury as a circumstance for such inference as the facts attending it might reasonably

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warrant. But the denial reduced it to a mere charge, and certainly that is no evidence of guilt." Citing *Kendrick v. State*, 9 Hum., 723.

In *Daugherty and Wife v. H. C. Marcum et al.*, a civil case, 3 Head, 323, this court said:

"All persons being *sui juris* are required to speak out when an assertion is made, or an act done in their presence, or with knowledge on their part, incompatible with their legal rights; and the failure to do so is taken as a tacit admission of the truth of the fact so asserted, or of the right of the person to do the act. This cogent principle applies as much between relatives as it does to strangers."

In *Queener v. Morrow*, 1 Cold., 123, 129, 130, also a civil case, this court said:

"The general rule is that an admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence. . . . The force and effect of such an admission must, of course, depend upon the circumstances under which it is made. In some cases, if clearly proved, it will be evidence of the most convincing kind; in others, it may be of very little force and perhaps entitled to no consideration. . . . And it is always to be borne in mind that it is the most dangerous kind of evidence. . . . In order that a party may be affected by the statement of another, on the ground of his implied admission of its truth by silent acquiescence, it must distinctly appear that he heard and fully understood such statement. . . . The oc-

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casion must also have been such that the party sought to be affected was at liberty to interpose a denial of the statement; and he must not only have had the opportunity to speak, but the statement must have been in respect to some matter directly affecting his rights, so as properly and naturally to demand a contradiction, if untrue."

Mr. Elliott, in his recent work on Evidence, vol. 1, sec. 221, says as follows:

"But in order that admissions may be inferred from silence or acquiescence, it must usually appear that the language or conduct in question were known and understood by the party claimed to have acquiesced therein, and that he was naturally called upon to take some action or make some response thereto. Such evidence should be received with caution, but if it is uncertain whether the party claimed to have acquiesced therein heard and understood the statements, the question is usually one for the jury to determine."

Again, at sec. 230, the same author says:

"The general rules governing the subject of this section have already been stated and it has been shown that silence and apparent acquiescence to be effective as an admission, must be such, or under such circumstances as to 'exhibit some act of voluntary demeanor or conduct,' of the party sought to be charged with the admission."

This question arose and was considered by this court in *Green v. State*, 97 Tenn., 50, 62-66.

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The court, in that case [pp. 64, 65], instructed the jury that

"Such evidence should be carefully and cautiously scrutinized, as it is considered of a dangerous character and, before any inference of an implied admission or acquiescence in the truthfulness of the statement can be drawn by the jury against the defendant, it must appear affirmatively that the defendant heard and fully understood the statements; that they were made under such circumstances as afforded the defendant opportunity to speak or act, or the circumstances did not naturally, properly, or reasonably call for a denial on his part, or the peculiar circumstances prevented a denial, you would not give any weight whatever to defendant's silence or failure to contradict the same. But if it appears that any such statements are proven and defendant heard and understood the same and had the opportunity to act and speak, and the statement naturally and reasonably called for a denial on the part of the defendant and was such as reasonably permitted a denial, and he did not contradict or deny the same, then the jury may consider the same as proven for the purposes aforesaid, not as proof or evidence of the circumstances detailed in the statements, but to draw such inference as they think right. It is a rule of law that when a prisoner is accused of crime and remains silent under the charge, such fact may go to the jury as a circumstance for such inference as it may reasonably warrant. But acquiescence to a statement, to have the effect of an ad-

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mission, must exhibit the same act of the mind and amount to voluntary demeanor or conduct of the party. And where it is acquiescence in the conduct or language of others, it must plainly appear that such conduct was fully known and the language fully understood by the party before any inference can be drawn from his passiveness or silence. The circumstances, too, must not only be such as afforded him an opportunity to act or to speak, but such, also, as would properly and naturally call for some action in reply from men similarly situated, and you, as jurors, should look to all the surroundings and circumstances confronting the prisoner, and his explanation of same."

This court, in speaking of that charge, said:

"In view of the strong admonition delivered by the court to the jury, in respect of the dangerous character of this evidence and the very circumscribed limits within which they are permitted to consider it at all, we are unable to perceive any error in the admission of this testimony of which the prisoner can complain."

This court further said:

"It is admitted that such evidence should always be received with much caution. In some cases it may be equivocal and of the lightest possible value; in others, it may be entitled to much weight. Its value, of necessity, must be estimated by the jury. If it is doubtful whether the defendant heard or understood the proposition, to which his silent assent is claimed, the jury may determine it. The degree of credit due to such

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tacit admissions is to be estimated by the jury, under the circumstances of each case." See also Rice on Evidence, vol. 3, p. 501.

Mr. Wharton in his work on Criminal Law, sec. 696, says:

"Where a man had full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury."

In *Commonwealth v. Kenney*, 12 Metc. [Mass.] (S. C., Amer. Dec., 672), it was said that, if the statement is not heard by the accused, or if being heard, he denied it, or if circumstances existed at the moment which prevented a reply or rendered a reply inexpedient or improper, the evidence certainly is of no value." *Low v. State*, 108 Tenn., 127, 128.

An analysis of these cases will show (1) That when the accusation is denied, it is not admissible at all as an evidential fact and has no probative effect whatever. (2) When the defendant stands mute in the face of the charge, that fact is interpreted as a circumstance tending to show guilt, provided the defendant heard and understood the charge, and the situation of the parties demanded a denial, all of which must be left to the determination of the jury. (3) That evidence of silent acquiescence is of a dangerous character, and must be received with great caution.

There is not one line in the charge of the trial judge

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instructing the jury how they should weigh and determine the statement of Mrs. Townes, nor was there any admonition to the jury of the dangerous character of this evidence, and that it should be received with great caution. It is the province of the jury to interpret such silence and determine whether defendant's silence was under the circumstances, excused or explained. In the absence of any instructions on this subject, counsel for defendants submitted the supplemental requests marked three, four and five.

The third request was to the effect that such an accusation if allowed to pass unchallenged, can only be looked to as a circumstance tending to show the guilt of defendant, and, as such, is entitled only to such weight as the jury might give it, in view of all the proof in the case. The refusal of the court to give this request was prejudicial to defendant and is reversible error.

The fourth request was to the effect that if defendant denied the statement of Mrs. Townes, or if what he said at the time, under all the circumstances of the case, in effect amounted to a denial, then the statement claimed to have been made by Mrs. Townes is incompetent and should not be considered by you as evidence for any purpose.

We do not think this instruction should have been given, for the reason defendant did not claim that he had denied the statement of Mrs. Townes, nor was any fact relied on by him as amounting to a denial of such charge.

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The fifth request was to the effect that if the statement was made in the presence of the defendant and he failed to make any response to such statement, then the jury should consider whether, under all the surrounding circumstances, considering the grief and distress of his daughter, a denial of her statement was demanded.

This instruction should have been submitted to the jury under the authorities already cited.

It is also assigned as error that the trial judge failed to instruct the jury as to the effect of defendant's proof as to his good character.

It is certainly true that the court should have given the jury some instructions on this subject—especially in view of the excellent character proven by defendant. The court correctly told the jury that proof of good character should be looked to in weighing the credibility of witnesses and that defendant's testimony should be weighed as that of other witnesses, but he failed to charge that proof of good character would strengthen the presumption of defendant's innocence, as frequently held by this court. We find, however, there was no request for further instructions on this subject.

Reversed and remanded.

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STATE v. RIDLEY *et al.**

(Nashville. December Term, 1904.)

1. COUNTY TRUSTEE. Not insurer of public funds. Liable for lack of diligence, prudence and caution.

A county trustee is not an insurer of the safety of public funds, but if, in selecting a depository, he acts without proper diligence, caution, prudence and good faith, and the fund is lost in consequence, he, and the surety on his official bond are liable therefor.

Case cited and approved: State, for use, etc., v. Copeland, 96 Tenn., 296.

2. SAME. Same. Same. Case in judgment.

A county trustee deposited public funds in a new bank with an authorized capital stock of \$25,000, of which only \$1,100 was paid in, and not more than \$5,000 subscribed. It was a matter of common information that the bank selected was of questionable standing, and the trustee was warned by his friends that it was unsafe, and that the public funds should not be put into it. In making the deposit the trustee secured to himself a personal benefit in that the bank paid the premium to the Guaranty Co. for making his bond, and paid one-half the salary of his deputy. The trustee could, and doubtless did, know the facts, but relied upon what he deemed the honesty of the management. There were other banks of ample solvency and reputable standing in the community in which he could have safely kept the money.

Held, that the estate of the trustee, and the surety on his bond, are liable for the public funds thus deposited by him that were lost by the failure of the bank.

*As to liability on official bond for loss of money by failure of bank, see note to *Wilson v. People* (Colo.), 22 L. R. A., 449.

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3. **SAME.** Not released by adoption of report of successor showing sum due from failed bank.

A report made to the county court by the successor of a deceased trustee, the object of which was to show what funds came to his hands as such successor, and which was spread on the minutes of the court by a decree reciting that it was "read, approved and adopted," does not operate as a settlement with, and a release of, the estate of the deceased trustee for sums shown by said report to be due from an insolvent bank in which the deceased trustee had deposited public funds.

4. **STATE REVENUE AGENT.** May maintain suit in name of State for use of county against trustee and his surety for county funds.

A state revenue agent may properly bring suit in the name of the State, for the use of the county, to recover of the county trustee, and the surety on his bond, county funds improperly deposited by such trustee in an insolvent bank.

Case cited and approved: State, for use. etc., v. Kelly, 111 Tenn., 588.

5. **SAME.** Fees should be fixed by court at reasonable amount.

The statute authorizing state revenue agents to prosecute suits to recover revenue due the State and counties does not arbitrarily fix the amount of the fees of the revenue agent and his attorneys, and such fees should be determined by the court at a reasonable amount.

6. **TRUSTEE'S COMMISSIONS.** May be applied to reduce liability of deceased trustee for county funds.

Where a trustee is held liable for county funds deposited by him in an insolvent bank, it is proper to apply commissions earned by the trustee between the time of the failure of the bank and his death to reduce the amount of the liability of his estate and his surety.

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FROM WILLIAMSON.

Appeal from the Chancery Court of Williamson County.—JOHN ALLISON, Chancellor.

HENDERSON & BERRY and THOS. B. JOHNSON, for Williamson County.

R. N. RICHARDSON, for estate of W. T. Ridley.

BOYD & MCNEILLY and JOHN J. VERTREES, for Fidelity & Guaranty Co.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill to hold W. T. Ridley, trustee of Williamson county, and the United States Fidelity & Guaranty Company, his surety, liable for county funds deposited in an insolvent bank by the trustee, and thus lost to the county.

The chancellor, after a large mass of proof had been taken, held the estate of Ridley and the company, as his surety, liable for the funds, and for reasonable fees to the state revenue agent, who brought the suit, and his attorneys, and declined to find liability for a penalty of one per cent. per day, asked for in the bill.

Upon a reference to the master, he reported that the

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amount for which Ridley and his surety were liable was \$13,305.91, and that the allowance to the revenue agent and his attorneys should be seven and one-half per cent. each on the amount recovered, and for these amounts judgment was rendered, from which both parties appealed.

The court of chancery appeals affirmed the decree of the chancellor, and gave judgment for \$13,658.51 for the benefit of the county, and \$1,024.38 for the revenue agent, for use of the State, and a like sum of \$1,024.38 as fees for his attorneys, and against defendants, for all the costs of the appeal, and the cause was directed to be remanded to be further proceeded with.

From this decree both parties have appealed to this court, and have assigned errors.

The court of chancery appeals properly held that the liability of the defendants should be measured by the rules announced in *State, use, etc., v. Copeland*, 96 Tenn., 296, 327, 34 S. W., 427, 31 L. R. A., 844, 54 Am. St., 840, when applied to the facts of this case; in substance, that the trustee was not an insurer of the safety of the public funds, but was liable if he acted without proper diligence, caution, prudence, and good faith, and the fund was lost in consequence, and that such diligence, caution, and prudence must be exercised in selecting a depository for the public funds.

That court reports that it was matter of common information that the bank selected was of questionable standing, and that the trustee was warned by his friends

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that it was unsafe, and that public funds should not be put into it; to which he replied that it was nobody's business, as he had made a good bond; that in making the deposit he secured to himself personal benefit, in that the bank paid the premium due from him to the guaranty company for making his bond, and one-half the salary of his deputy; that the capital stock of the bank was authorized to be \$25,000, but only \$1,100 was ever paid in, and not more than \$5,000 was ever subscribed. It was a new bank; started in business about the time Ridley was elected trustee, and he could, and doubtless did, know the facts, but relied upon what he deemed the honesty of the management. There were other banks, of ample solvency and reputable standing, in Franklin, in which he could have safely kept the money.

That court, summarizing, says: Mr. Ridley's administrator and security could not rely upon the fact that Ridley was honest, and, in his confiding nature, believed the bank to be safe, as it was not so considered by well-informed men in business circles in the community; and this he knew, or could have known in the exercise of that diligence, caution, and prudence required by law.

We think the court of chancery appeals and chancellor were eminently correct in holding Ridley's estate and his surety liable under the facts found by them.

It is said, however, that after the failure the county court settled with the trustee or his successor, and released him from all liability.

This defense was not set up in the pleadings.

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The fact of the alleged release and settlement came into the record in this way :

After Ridley's death his deputy was appointed his successor by the county court, and submitted a report to the court, whose object was, as found by the court of chancery appeals, to show what funds came to his hands as such successor.

It does not appear that Ridley's administrator, or any one representing his estate, was a party to this report, or had anything to do with it.

In this report, Robinson, the successor, charged up Ridley with proper amounts, and gave him credit for warrants paid for uncollected taxes, for commissions, and for amount due from the Citizens' Bank & Trust Company, and for the cash turned over to him ; and this report was spread upon the minutes of the court, with its approval, October term, 1902. The decree spreading it on the minutes recites that it was "read, approved, and adopted."

McFarland, an expert, exhibited a copy of this report to his deposition, which was taken afterwards, and in this way it was embraced in the record ; but it was never set up or relied on as a release in any pleading, but the defense was that Ridley kept his books correctly, made regular settlements and reports, which were approved, and that the county authorities knew where he kept the funds, and the auditing committee approved his accounts, that he was elected a second term to his office,

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and under his administration the value of warrants on the county was brought up to par, and that this estopped the county to maintain this suit.

Without passing upon other matters of contention in regard to this paper or report, we quite agree with the court of chancery appeals that it was never intended as a settlement with Ridley or a release of his estate from liability, but it was simply a statement to show what amounts went into the hands of Robinson, his successor.

Very soon after it was filed and received, and approved by the court, it approved the action of the county judge in joining in this suit with the revenue agent; and it is very evident that no one then, or while the suit was pending below, imagined that this was a settlement and release.

After this report was made, the commissions due to Ridley were claimed by the county to go on his indebtedness. They were also claimed by Ridley's administrator and by agreement were paid into this case, and decreed by the chancellor to the credit of the county. No claim was then made that there had been a settlement with and release of Ridley.

We think the finding of the court of chancery appeals on this feature of the case is entirely correct both as to the purpose and effect of this report.

We think the court of chancery appeals properly disposed of the exceptions to the evidence offered, and it is not necessary to go into detail on this feature of the case.

The suit was properly brought by the state revenue

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agent, and joined in by the county. *State, use, etc., v. Kelly*, 111 Tenn., 583, 82 S. W., 311.

We are entirely content with the fees allowed the revenue agent, and also those allowed his attorneys. The statute does not arbitrarily command the amount of the fee, and it should be fixed at a reasonable amount.

We think, also, the commissions earned between the failure of the bank and the death of Ridley were properly applied to reduce the amount of Ridley's liability in his favor and in favor of his surety.

Upon the whole case, we see no error in the decree of the court of chancery appeals, and it is affirmed.

State, ex rel., v. Board of Inspectors.

STATE, *ex rel.* LATTURE, v. BOARD OF INSPECTORS.

(Nashville. December Term, 1904.)

1. **MANDAMUS.** Rendered unnecessary by induction of relator into office, when.

Further proceedings on a petition for mandamus against the governor, secretary of state, and attorney-general, constituting the board of inspectors of elections, to require them to compare the vote and declare the result of an election for joint representative, are rendered unnecessary and improper, so far as the merits of the controversy are concerned, by the induction into office of the relator, pending the trial of the case in the supreme court.

2. **SAME.** Will not lie against governor in any case.

The governor of the State constitutes one of the co-ordinate departments of the government, and he cannot be compelled by mandamus to perform any act which devolves upon him as governor. He may be appointed by the legislature to act upon any board created by it, whether the act to be performed is ministerial, executive or political, but in acting upon such board he does not denude himself of his independent position as chief executive of the State, and it is optional with him whether he will serve or not. He can not be coerced in the performance of any duty imposed upon him by the mandate of any court.

Cases cited and approved: Turnpike Co. v. Brown, 8 Baxt., 490; Bates v. Taylor, 87 Tenn., 319; and cases from other States cited on pages 519 and 520.

3. **STATUTORY BOARDS.** Majority of, cannot act unless so provided by statute.

In the absence of a provision in the law creating the board of inspectors of elections, that a majority may act, the secretary of state and attorney-general cannot perform the duties of the board except in conjunction with the governor.

Case cited and approved: Carroll v. Alsop, 107 Tenn., 257.

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4. **SAME.** Question reserved.

The question is reversed and not decided as to whether the secretary of the state and attorney-general may be compelled by mandamus to do any official act imposed by the legislature as members of a board.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

HARR & BURROW, for relator.

ATTORNEY-GENERAL CATES, for the board of inspectors.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is a bill for mandamus to compel the governor, secretary of state, and attorney-general, constituting the board of inspectors of elections, to compare the vote for joint representative in Hawkins and Sullivan counties in the last election, and to declare the person receiving the highest number of votes duly elected.

The defendants to the bill appeared by the attorney-general of the state, and demurred to it, and also moved to quash the alternative writ of mandamus, because the chancery court was without jurisdiction to grant the relief sought, and had no power to coerce said officials, or either of them, in the performance of the duties imposed by law upon them.

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Both the demurrer and the motion to quash were overruled, and the defendants excepted.

An answer was thereupon filed, which was demurred to by the relator, because (1) it did not set out any real reason why the board of inspectors should not compare the vote and declare the result, and (2) because the papers which were exhibited with and made a part of the answer were not election returns, and could not be considered by the board for any purpose.

The chancellor sustained the demurrer, and decreed that a peremptory writ of mandamus issue, requiring the defendants, as a board of inspectors, to compare the vote, and declare the result of the election.

The defendants prayed and were granted an appeal, and have assigned errors.

Before the case was reached for trial in this court, the relator was, by the house of representatives, declared elected joint representative for the counties of Hawkins and Sullivan, and was inducted into office, and has taken his seat as such joint representative.

Further proceedings in the mandamus case are therefore wholly unnecessary and improper, so far as the merits of the controversy are concerned; and it only remains to dispose of the costs which have accrued in the proceeding.

We are of opinion that neither the chancery court nor this court has any jurisdiction or power to grant the mandamus prayed for against the defendants in this case.

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The governor of the State constitutes one of the co-ordinate departments of the government, and he cannot be compelled by mandamus to perform any act which devolves upon him as governor.

The legislature may appoint or name him to act upon any board created by it, but it is optional with him whether he will serve or not.

If he does serve, his action is entirely optional; and he cannot be coerced by the courts.

In acting upon such board he does not denude himself of his high and independent position as chief executive of the State and the head of that department.

And this is true whether the act to be performed is ministerial, executive, or political. *Turnpike Company v. Brown*, 8 Baxt., 490, 35 Am. Rep., 713; *Bates v. Taylor*, 87 Tenn., 319, 11 S. W., 266, 3 L. R. A., 316.

He is not subject to the mandate of any court.

No court can coerce him. No court can imprison him for failing to perform any act, or to obey any mandate of any court.

This holding is in accord with that of other courts in other States, though the contrary is held in some cases in regard to ministerial acts. 6 Am. & Eng. Ency. Law, 1015, 1016; *Hovey v. State*, 127 Ind., 588, 27 N. E., 175, 11 L. R. A., 763, 22 Am. St. Rep., 663; *People, ex rel., v. Governor*, 29 Mich., 320, 18 Am. Rep., 89; *Hawkins v. Governor*, 1 Ark., 570, 33 Am. Dec., 346; *In re Dennett*, 32 Me., 508, 54 Am. Dec., 602; *State v. Warmouth*, 22 La. Ann., 1, 2 Am. Rep., 712; *State v. Warmouth*, 24 La.

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Ann., 351, 13 Am. Rep., 126; *State v. Board, etc.*, 42 La. Ann., 647, 7 South., 706, 8 South., 577; *Mauran v. Smith*, 8 R. I., 192, 5 Am. Rep., 564; *Vicksburg, etc., R. R. Co. v. Lowry*, 61 Miss., 102, 48 Am. Rep., 76; *State v. Governor*, 25 N. J. Law, 331; *State v. Drew*, 17 Fla., 67; *People v. Bissell*, 19 Ill., 229, 68 Am. Dec., 591; *People v. Yates*, 40 Ill., 126; *People v. Cullom*, 100 Ill., 472; *Turnpike Co. v. Brown*, 8 Baxt., 490, 35 Am. Rep., 713; *Bates v. Taylor*, 87 Tenn., 319, 11 S. W., 266, 3 L. R. A., 316; *State v. Towns*, 8 Ga., 360; *Houston, etc., Ry. Co. v. Randolph*, 24 Tex., 317; *Appeal of Hartranft*, 85 Pa., 433, 27 Am. Rep., 667; *Mississippi v. Johnson*, 4 Wall., 475, 18 L. Ed., 437.

Whether the secretary of the state and attorney-general may be compelled by mandamus to do any official act imposed by the legislature as members of a board, we need not decide.

Under this act they could only sit and perform their duties as a board in conjunction with the governor. They cannot act without the governor. The law creating the board makes no provision that a majority may act, and in the absence of such provision no action can be taken, except by the entire board participating in it. *Carroll v. Alsup*, 107 Tenn., 257, 271, 273, 64 S. W., 193.

Without going further into matters set up, we are of opinion that the defendants could not be coerced or compelled in this action to do what was demanded of them.

This being so, the petitioner's bill is dismissed; and he is taxed with all the costs of the cause.

McGregor et ux. v. Gill.

MCGREGOR et ux. v. GILL.

(Nashville. December Term, 1904.)

1. COMMON CARRIER. Who is.

A common carrier of passengers is one who undertakes for hire to carry all passengers indifferently who may apply for passage, and to constitute one, a common carrier, it is necessary that he should hold himself out to the community as such.

Case cited and approved: N. & C. R. R. Co. v. Messino, 1 Sneed, 220.

2. SAME. Livery-stable keeper is not.

A livery-stable keeper who lets his conveyances for hire, either with or without drivers, as occasional demands are made upon him by his customers, is not a common carrier, but a private carrier for hire, and the extent of his obligation is to exercise that degree of care and skill in the selection of the vehicle and team which he lets, and of the driver which he sends in charge, that a prudent man, having due regard for his social relations, would bestow on such a matter.

Case cited and distinguished: Lawrence v. Hudson, 12 Heisk., 671.

FROM MONTGOMERY.

Appeal from the Circuit Court of Montgomery County.—B. D. BELL, Judge.

DANIEL & DANIEL and LEECH & PONDER, for McGregor et ux.

MICHAEL SAVAGE and DANCY FORT, for Gill.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This is an action to recover damages for personal injuries sustained by Mrs. McGregor. The trial resulted in a verdict and judgment in favor of the defendant in the court below, and the plaintiffs have appealed.

The defendant Gill was a livery-stable keeper in the city of Clarksville. In August, 1902, he was called upon by Mr. Tyler, of that city, who stated to him that his sister-in-law, Mrs. Draughon and her son, with a young lady companion, were upon a steamboat which was stranded in the river some thirty miles above Clarksville, and he asked the defendant in error to furnish a wagon and a driver to go for them and their baggage, and bring them through the country into the city. Gill consented to do so, and thereupon Mr. Tyler selected the conveyance, and asked that it be sent under the charge of a white driver, as he thought it probable these ladies would desire to come through the country at night, and he thought it would be safer for them to be with a white, than with a negro, driver. To this Gill replied that his drivers were negroes, but that in an emergency he was in the habit of employing one Hatcher, and asked Mr. Tyler whether the employment of Hatcher for this drive would be acceptable to him. Mr. Tyler agreed that it would be. Putting the wagon under the charge of Hatcher, Gill started it to the point on the river opposite to the sandbar on which the boat was lodged, which point was reached about six o'clock in the evening. Mrs.

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Dranghon, at whose instance the conveyance had been sent, invited Mrs. McGregor, who was one of the passengers on the boat, together with others, to take seats in the conveyance, and go in it to Clarksville. This invitation was accepted. The baggage was loaded into the wagon, and Mrs. McGregor and others took seats in it. Under the direction of these parties Hatcher at once started, during the night, on his return trip to Clarksville. On his way back, at a point where there was considerable depression in the road, by apparently careless driving the wagon was overturned, and Mrs. McGregor was seriously injured. For this injury the present suit was instituted.

The record shows that Hatcher, the driver, was well known and esteemed in the community of Clarksville; but that he was regarded, not only by Gill, but by others who had the best opportunity of being acquainted with his character and habits, as an unusually safe and trusty driver.

Under these facts we know of no principle which would authorize the maintenance of this action. The defendant in error was not in any sense a common carrier. To the contrary, he was clearly a private carrier for hire, and as such the extent of his obligation was to exercise that degree of care and skill in the selection of the vehicle and team which he let, and of the driver he sent in charge which a prudent man, having due regard for his social relations, would bestow in such a matter. This court, in *N. & O. R. R. Co. v. Messino*, 1

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Sneed, 220, approved as sound the following charge of the circuit judge in that case: "A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. . . . To constitute one a common carrier it is necessary that he should hold himself out to the community as such."

This definition is in strict accord with the text as found in volume 6, p. 534, Cyc., and Hutchinson on Carriers, 48; Story on Bailments, section 495; Thompson on Negligence, vol. 3, section 2537; and Hale on Bailments and Carriers, 489. And it necessarily excludes a livery-stable keeper, who lets for hire his conveyances, either with or without drivers, as occasional demands are made upon him by his customers. As was said by the circuit judge in the course of his charge in the *Messino* case, above quoted from: "It is not every carrying of passengers for hire that constitutes a party a common carrier. A party having the conveniences for carrying persons may in some, or perhaps in many, cases carry passengers for hire, when done at the instance of the passengers, and for their accommodation, without incurring the responsibilities of common carriers."

The present case bears no likeness to that of *Lawrence v. Hudson*, 12 Heisk., 671, relied on as authority by the plaintiff in error. In that case the defendant was the owner of a line of omnibuses running from Nashville to Edgefield, holding himself out to the public as ready and willing to carry for hire all persons who offered themselves as passengers. This owner was, upon all the

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authorities, a common carrier, and was properly held to the full limit of liability imposed upon one so engaged.

Upon the undisputed fact in the record that Gill exercised reasonable prudence in the selection of the driver of the wagon, he was not liable, even if negligent driving occasioned the injury of which plaintiffs complain.

Judgment is affirmed.

Garrison et al. v. Trotter.

GARRISON *et al.* v. TROTTER.

(Nashville. December Term, 1904.)

COSTS. Equitably adjusted when neither is "successful party." Case in judgment.

Plaintiff recovered a judgment before a justice of the peace against defendant, for one hundred dollars and all costs, and defendant appealed to the circuit court, where there was a trial *de novo* in which plaintiff recovered a judgment for \$12.75 and costs against defendant. On motion of defendant to retax the costs, the circuit court adjudged the costs accrued before the justice of the peace against the defendant, and the costs accrued on the appeal and in the circuit court against the plaintiffs, from which judgment as to costs plaintiffs appealed;

Held, (1) That neither party was successful within the meaning of the Code provision that the successful party shall be entitled to full costs, and,

(2) That the circuit court exercised a sound discretion in making an equitable adjustment of the costs, and in conformity with the requirements of the Code that the law of costs shall be construed remedially, and not as a penal law.

Code cited and construed: secs. 4938, 4961, 4962 (S); secs. 3921, 3944, 3945 (M. & V.); secs. 3197, 3219, 3220 (1858).

Cases cited and approved: Parham v. Gibbs, 16 Lea, 296; Williams v. Cosby, 2 Helsk., 644; Schoonoven v. Stillman, 3 Shan. Tenn. Cas., 574.

FROM GILES.

Appeal from the Circuit Court of Giles County.
—SAM HOLDING, Judge.

Garrison et al. v. Trotter.

STEELE & ESLICK, for Garrison et al.

FLOURNOY RIVERS and BEN CHILDERS, for Trotter.

MR. JUSTICE McALISTER delivered the opinion of the Court.

The only question presented on this record is the taxation of costs. The suit was originally commenced before a justice of the peace for Giles county to recover damages for the use and occupation for 1903 of certain land belonging to plaintiffs. The trial resulted in a judgment in favor of the plaintiffs against defendant for \$100 and costs. The defendant alone appealed from this judgment to the circuit court of Giles county, where the cause was tried on February 4, 1904, before the circuit judge and a jury, resulting in a judgment in favor of the plaintiffs for \$12.75 and all costs against defendant.

It was conceived by counsel for defendant that his client had been the successful party on the appeal, inasmuch as plaintiffs had recovered a smaller judgment in the circuit court than that rendered by the justice. Accordingly a motion was submitted on behalf of defendant to tax the plaintiffs with the costs of the appeal. The circuit judge sustained defendant's motion, and adjudged all of the costs that accrued before the justice of the peace against the defendant, and all of the costs of the appeal and all the costs that accrued in the circuit court against the plaintiffs.

Garrison et al. v. Trotter.

The first question presented on the appeal of the plaintiffs is whether the defendant, who alone appealed from the judgment of the justice of the peace to the circuit court and succeeded there in reducing the amount of the judgment, is the successful party under the statute, and therefore entitled to costs.

It is insisted on behalf of the plaintiffs that they were the successful parties to the suit, and under the statute are entitled to full costs against the defendant. Their insistence is based upon the proposition that they recovered a judgment before the justice of the peace for \$100, and did not appeal, but defendant did appeal, and the trial in the circuit court was *de novo*, and there the plaintiffs again recovered a judgment for \$12.75.

It is further insisted that defendant did not, before or after the commencement of the suit, tender plaintiffs any amount whatever in settlement of their demand, and hence must be operated with all the costs incident to any recovery by plaintiffs.

The question presented is one of first impression in this State, so far as we are advised by any published opinion of this court. It is well settled that a plaintiff who recovers a judgment before a justice of the peace and fails on appeal to the circuit court to increase his judgment is not a successful party in the sense of the statute, and is operated with all the costs. *Parham v. Gibbs*, 16 Lea, 296; *Williams v. Cosby*, 2 Heisk. 644.

It may be conceded that if the defendant, on the trial before the justice of the peace, had tendered the sum of

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\$12.75 adjudged against him on the trial in the circuit court, he would have been in an attitude to make this question, since, if the plaintiffs failed to accept his tender, there was no recourse left to the defendant but to pray an appeal and prosecute his suit in the circuit court. In this case, however, no tender was made before the justice of the peace, and the defendant, without admitting any liability, appealed from the judgment of the justice of the peace, and thereby forced the plaintiffs to litigate with him in the circuit court over the entire amount involved. It cannot, therefore, be said that defendant is the successful party within the meaning of Shannon's Code, section 4938, which provides that the successful party in all civil actions is entitled to full costs, etc. Neither can the plaintiffs rightfully claim to be the successful party, since their recovery before the justice was by the judgment of the circuit court reduced eighty-seven and one-half per cent.

It follows, therefore, that neither party being successful within the meaning of the statute, the taxation of costs must be governed by section 4962, Shannon's Code, which provides, viz:

"And if any case shall occur not directly or by fair implication embraced in the express provisions of the law, the court may make such disposition of the costs, as in its sound discretion may seem right."

This section was applied in *Schoonover v. Stillman*, 3

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Tenn. Cas., 574; *Parham v. Gibbs*, 16 Lea, 296; *Williams v. Cosby*, 2 Heisk., 644.

We are of opinion that upon the facts presented in this record the circuit court exercised a sound discretion in making an equitable adjustment of the costs, and in conformity with the requirements of the Code that the law of costs shall be construed remedially, and not as a penal law. Shannon's Code, section 4961.

The judgment of the circuit court will be affirmed.

Murphy v. State.

MURPHY v. THE STATE.

(*Nashville*. December Term, 1904.)

1. **STOCK LAW.** Not unconstitutional because applicable to counties of certain population only.

The Act of 1903 (ch. 499) to prohibit the running at large of hogs, sheep and goats in counties having a population of not less than 25,000 and not more than 25,100, according to the federal census of 1900, or any subsequent federal census, is not arbitrary and vicious class legislation, within the prohibition of article 11, section 8, of the constitution, but is constitutional and valid.

Act cited and construed: 1903, ch. 499.

Cases cited and approved: *Peterson v. State*, 104 Tenn., 128; *Turner v. State*, 111 Tenn., 593; *Cook v. State*, 90 Tenn., 407; *Condon v. Maloney*, 108 Tenn., 82; *Archibald v. Clark*, 112 Tenn., 532.

2. **SAME**, Violation of, not indictable where civil remedy only is provided.

Said Act (1903, ch. 499) provides a civil remedy in the nature of an action for damages, enforceable by means of a lien on the offending stock, and does not declare a violation of the act to be a misdemeanor or indictable; hence the remedy provided by the act is exclusive, and a criminal prosecution cannot be predicated thereon.

Cases cited and approved: *State v. Maze*, 6 Humph., 17; *State v. Lorry*, 7 Baxt., 95; *State v. Manz*, 6 Cold., 557.

FROM ROBERTSON.

Appeal in error from the Circuit Court of Robertson County.—B. D. BELL, Judge.

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J. B. FORT and TRUE & DORSEY, for Murphy.

ATTORNEY-GENERAL CATES, for the State.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

The plaintiff in error, Murphy, was indicted and convicted in the circuit court of Robertson county for permitting his hogs to run at large in that county, and adjudged to pay a fine of \$25, from which judgment he has brought the case to this court by appeal in the nature of a writ of error.

The indictment is preferred under chapter 499, p. 1342, of the Acts of the general assembly of 1903, entitled "An act to prohibit the running at large of hogs, sheep and goats in counties having a population of not less than 25,000, and not more than 25,100, according to the federal census of 1900, or any subsequent federal census."

Section 1 of this act provides that it shall be unlawful for the owner or any one having control of hogs, sheep and goats to allow them to run at large in counties of this State having a population of not less than 25,000 nor more than 25,100 according to the federal census of 1900 or any subsequent federal census.

Section 2 provides for a lien upon stock allowed to run at large in violation of this act, and its enforcement for damages done by such stock; and section 3 allows any one upon whom such stock may trespass to confine

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it and recover of the owner reasonable compensation for its keep, for which a lien is also given.

Section 4 provides that the act shall not operate as a repeal of the railroad stock and fence law, and by section 5 it is made effective from and after its passage.

The first error assigned is that this act violates article 11, section 8, of the constitution of Tennessee, and is therefore invalid. The statute is not subject to this objection. It is now well settled that statutes of this character are not arbitrary and vicious class legislation within the prohibition of this provision of the constitution, but are constitutional and valid. *Peterson v. State*, 104 Tenn., 128, 56 S. W., 834; *Turner v. State*, 111 Tenn., 593, 69 S. W., 774; *Cook v. State*, 90 Tenn., 407, 16 S. W., 471, 13 L. R. A., 183; *Condon v. Maloney*, 108 Tenn., 82, 65 S. W., 871; *Archibald v. Clark*, 112 Tenn., 532, 82 S. W., 310.

The other error assigned is that the statute does not make the violation of it a misdemeanor, but provides a civil remedy against all violators, and therefore no criminal action can be predicated upon it. This point is well taken, and must be sustained, upon the authority of the cases of *State v. Maze*, 6 Humph., 17; *State v. Lorry*, 7 Baxt., 95, 32 Am. Rep., 555; and *State v. Manz*, 6 Cold., 557.

The judgment of the circuit court is therefore reversed, and the case dismissed.

Pressly v. State.

PRESSLY V. STATE.

(*Nashville*. December Term, 1904.)

1. **INTOXICATING LIQUORS.** Gift to minor. Standing permission from parent no defense.

It is no defense to a prosecution for giving intoxicating liquors to a minor that the giver held a written permit from the mother of the minor to give any of her children drinks of whiskey or brandy at any time he might desire to do so; and it is not error to refuse to permit the defendant to introduce such writing in evidence.

Code cited and construed: Sec. 6786 (S); sec. 5673 (M. & V.); sec. 4863 (1858).

2. **MISDEMEANOR.** When statute provides punishment, any other excluded.

When a statute creates a misdemeanor, but is silent as to the punishment, the law provides fine and imprisonment, or either, at the discretion of the court; but where the statute creating an offense prescribes a special form of punishment therefor, any other or additional punishment is excluded.

Cases cited and approved: *Atchison v. State*, 13 Lea, 275; *Wickham v. State*, 7 Cold., 525; *Durham v. State*, 89 Tenn., 723; *Kittrell v. State*, 104 Tenn., 522; *Thompson v. State*, 105 Tenn., 177; *Robinson & Walker v. State*, 2 Cold., 181; *State v. Keeton*, 9 Baxt., 559; *State v. Maze*, 6 Humph., 17; *State v. Lorry*, 7 Baxt., 95; *State v. Mans*, 6 Cold., 557.

Code cited: Secs. 6437, 7202, 7212 (S); secs. 5347, 6068, 6078 (M. & V.); secs. 4596, 5229, 5237 (1858).

3. **JUDGMENT OF COURT.** Erroneous judgment as to imprisonment corrected in supreme court.

Where the trial court, after properly imposing a fine, erroneously

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added imprisonment, the supreme court will modify the judgment by striking out the imprisonment, and affirm the judgment as modified.

Case cited and approved: *Griffin v. State*, 109 Tenn., 17.

FROM PUTNAM.

Appeal in error from the Circuit Court of Putnam County.—CORDELL HULL, Judge.

JOHN TUCKER, for Pressly.

ATTORNEY-GENERAL CATES, for the State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted and convicted in the circuit court of Putnam county on a charge of giving liquors to a minor without the consent of his parents. He was thereupon sentenced to pay a fine of \$10 and to six months' confinement in the county workhouse. From this judgment he has appealed and assigned errors. The statute under which he was indicted is found in Shannon's Code, section 6786, and reads as follows:

"It shall be unlawful for any person or individual, or firm or corporation, whether engaged or not in the manufacture or sale of any spirituous liquors, malt, or mixed liquors, their employees, agents, or servants, or

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other persons for them, knowingly to sell, give, furnish to, or procure for, any person under the age of twenty-one years, any spirituous, vinous, or malt liquors, or any mixture thereof with other liquors or ingredients, without the consent of the parents, guardian, or person having the care of such person under the age of twenty-one years."

The punishment is fixed by section 6789, which reads as follows:

"Any person or persons violating the provisions of sections 6786 or 6787 shall be guilty of a misdemeanor; and, upon conviction, shall be fined not less than ten nor more than two hundred dollars."

Two objections are made in this court.

The first is that his honor erred in refusing to permit the defendant below to introduce the following paper in evidence, executed by the mother of the minor, viz.:

"Mr. John Pressly: You can give any of my children drinks of whiskey or brandy at any time you may desire to do so. This December 1, 1903.

her

"ANGELINA X PALMER.

mark

"Attest: J. L. PALMER."

The mother of the boy was a widow. The child to whom the whisky was given was only 15 years old. The whisky was given to him during the month of July, 1904.

There was no error in the action of the trial judge in rejecting this paper. It was the specific purpose of the

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statute to restrain the giving, selling, or furnishing intoxicating beverages to minors, or procuring such beverages for them. An exception was permitted in case of the consent of "the parents, guardian or person having the care of such" minor. It was supposed that parents and guardians, and other persons having charge of minors would have concern for and exercise care over the children committed to them in the course of nature or by operation of law, and that they would use discretion in giving or withholding consent in every instance of a proposed gift or sale to such child or children. To admit the validity of such a general consent as the paper above set out purports to give would not only violate the spirit of the act, but would wholly frustrate the purpose which the legislature had in view; since a general consent of this character would be tantamount to a withdrawal of the child or children referred to in such paper from the protection of the act; at least, in favor of the person or persons to whom such writing might be addressed. If such consent should be held good, no sound reason could be offered against the validity of a writing addressed "to whom it may concern," conferring upon all persons who might choose to take advantage of it, the right to give intoxicating liquors to the children of any parent or guardian sufficiently heedless, or reckless, or wicked to consent to the debauching of the youth under their charge. The legislature did not intend to sanction such a course of conduct. Indeed, we believe that the legislature must have intended that a parent, or guardian,

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or other person having the care of a minor could give consent that another might give, sell to, furnish to, or procure liquors for, such minor only in cases of emergency; as, for instance, for medical purposes. It was never intended that a general permission should be given to enable minors to use intoxicating liquors as a beverage; on the contrary, authority to sell to, give to, furnish to, or procure liquors for them, is limited to such occasions and emergencies.

The second objection raised against the judgment of the court below is that his honor added imprisonment to the fine, and that he had no legal right to do so.

We are of the opinion that this objection is well taken, and must be sustained.

The rule at common law is thus stated by Mr. Bishop:

"The ordinary common-law punishment for misdemeanors is fine and imprisonment, or either, at the discretion of the court. It is imposed whenever the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature, but is silent as to the punishment, the common law provides fine and imprisonment." Bishop's New Criminal Law, vol. 1, sec. 940.

The foregoing rule is recognized in several of our own cases (*Atchison v. The State*, 13 Lea, 275; *Wickham v. The State*, 7 Cold., 525; *Durham v. The State*, 89 Tenn., 723, 18 S. W., 74; *Kittrell v. The State*, 104 Tenn., 522, 58 S. W., 120; *Thompson v. The State*, 105 Tenn., 177, 58 S. W., 213, 51 L. R. A., 883, 80 Am. St. Rep., 875); the

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fine being assessed by the court if \$50 or under, and by the jury if over \$50 (Shannon's Code, sec. 7212); and the imprisonment to be fixed by the court (Shannon's Code, sec. 7202). The Code further provides that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. Shannon's Code, sec. 6437.

See, also, *Robinson & Walker v. State*, 2 Cold., 181; *State v. Keeton*, 9 Baxt., 559.

It has been held, however, that where the statute which creates an offense does not make it indictable, but prescribes a penalty, the specific remedy given, the penalty, excludes the resort to an indictment. *State v. Maze*, 6 Hump., 17; *State v. Lorry*, 7 Baxt., 95, 32 Am. Rep., 555; *State v. Manz*, 6 Cold., 557. It would seem to be true, also, that where the statute creates an offense, and prescribes a special form of punishment, this would exclude any other different or additional punishment.

Such is the present case. The statute does not impose imprisonment, but declares that the punishment shall be a fine of not less than \$10 nor more than \$200.

We are of opinion, therefore, that his honor erred in imposing the imprisonment. This court, however, has power to modify the judgment by striking out the imprisonment and then affirming it as modified. *Griffin v. State*, 109 Tenn., 17, 70 S. W., 61. This course will be pursued, and the judgment will be remanded to be executed as modified.

McDonald v. Nashville.

McDONALD v. CITY OF NASHVILLE.

(*Nashville*. December Term, 1904.)

1. **ABATEMENT.** Death of plaintiff abates personal injury suit after two terms without revivor by administrator.

An action for damages for personal injuries brought by the injured party will abate when two terms of court have elapsed since the death of the plaintiff and there has been no revivor in the name of the administrator, in the absence of a showing that no one will administer, or that plaintiff died of the injuries for which he sued.

Code cited and construed: Secs. 4569-4571 (S); secs. 3560-3562 (M. & V.); secs. 2846, 2847, 2849 (1858).

2. **REVIVOR.** None by heirs or next of kin unless no one will administer.

And such suit cannot be revived in the name of the heirs at law or next of kin, unless it is shown that no person will administer on the estate of the deceased.

Case cited and approved: *Preston v. Golde*, 12 Lea, 267.

3. **SAME.** Cannot proceed in name of deceased unless he died of injuries sued for.

And such suit cannot be revived, or proceed, in the name of the deceased plaintiff himself, unless it appear affirmatively that he died of the injuries alleged to have been inflicted upon him.

Case cited and approved: *Daniel v. Coal Company*, 105 Tenn., 470.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.
—J. A. CAETWRIGHT, Judge.

McDonald v. Nashville.

BRIEN & NOBLE, for McDonald.

K. T. McCONNICO and HILL MCALISTER, for City of Nashville.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the circuit court of Davidson county on the 11th day of September, 1897, to recover damages for injury alleged to have been inflicted upon the plaintiff on the 12th day of September, 1896, produced by fright to the team attached to the conveyance in which the plaintiff was seated, received from steam emitted from a road roller or crusher which was at work on one of the streets of the city. A trial was had in the court below, which resulted in a verdict in favor of the city. From this judgment the plaintiff in error has appealed and assigned errors.

There is, however, a preliminary point made by defendant in error, which is conclusive of the case, and supersedes the necessity of our going into a special consideration of the errors assigned.

It appears that the case has been pending for several years, and has once before been to this court on appeal. After all of the issues had been made up, and after the previous appeal of this case, and more than six years after the alleged injury, McDonald died. His death was suggested and admitted of record on April 2, 1903. On this date an order went down purporting to revive the suit in the name of W. W. Meacheam and wife, Mary

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E. Trimier McDonald, Wm. L. McDonald, P. S. Hallick and wife, and Brown McDonald, as being the representatives and next of kin of the deceased. It does not appear from the record that J. G. McDonald died of the injuries received; on the contrary, it is to be inferred from the evidence that he died from some other cause.

The cause was never revived in the name of any administrator of the deceased, nor is the absence of such administrator in any way excused or accounted for in the record.

Under this condition of the record, when the case was called for trial on June 9, 1904, more than three terms of court having elapsed between the suggestion and admission of record of the death of the original plaintiff and the date of the trial in June, 1904, the defendant city presented these facts by special plea, and after this was overruled then the city moved that the cause be abated because there had been no revivor in the name of the administrator within the time required by law. The court below overruled the plea and also the motion.

The action of the court in overruling the motion for abatement was erroneous. Under the facts stated, the case could proceed only in the name of the administrator of the deceased.

The sections of the Code bearing upon the questions are as follows:

“Sec. 4569. No civil action commenced, whether founded on wrongs or contract, except actions for

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wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived.

"Sec. 4570. The intervention of a term between the death of a party and the qualification of a personal representative, shall not work an abatement or discontinuance of the suit; nor shall the suit abate or discontinue for the death of either party, until the second term after the death has been suggested or proved or admitted, and entry made to that effect.

"Sec. 4571. If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent."

In *Preston v. Golde*, 12 Lea, 267-275, it is held that, where the action should properly proceed in the name of an administrator, it cannot be revived in the name of the heirs at law, unless some reason is shown why the revivor was not made in the name of the administrator; that is, unless it is shown that no person will administer on the estate of the deceased pursuant to the terms of section 4571, supra. In *Daniel v. Coal Company*, 105 Tenn., 470, 58 S. W., 859, it was held that the action could not be revived in the name of the deceased himself, or proceed in that name, unless it appeared affirmatively that the latter died of the injuries alleged to have been inflicted upon him.

It results that there must be a judgment entered abating the action on the ground stated

Mays v. Beech.

MAYS v. BEECH *et al.*

(Nashville. December Term, 1904.)

1. **WILL.** Power of appointment. Under general power to appoint fee, donee may appoint lesser estate.

Under a general power to appoint an estate in fee, the donee of the power may appoint a lesser or qualified estate in the property, and it is not necessary to execute the power in its entirety, but a partial execution is valid.

Cases cited and approved: *Steifel v. Clark*, 9 Baxt., 471; *Williams v. Whitmore*, 1 Shann. Tenn. Cas., 250; *Butler v. Huestis et al.*, 68 Ill., 597; *In re Lawrence's Estate*, 136 Pa., 354; *Beardsley et al. v. Hotchkiss et al.*, 96 N. Y., 202; *Friend v. Oliver*, 27 Ala. (New Series), 534; *Wilson v. Wilson*, 21 Beavan's Reports, 28; *Bray v. Bree*, 2 Clark & Finley's House of Lords Repts., 453; *Phipson v. Turner*, 9 Simons' English Chancery Reports, 287; *Moses v. Martin*, 34 Beavan's Reports, 500.

2. **SAME.** Devise of income for life is devise of property for life. A devise of the rents, profits and income of real property to one for life is, in effect, a devise of the property itself for life.

Case cited and approved: *Johnson v. Johnson*, 92 Tenn., 563.

3. **SAME.** Construction of. Case in judgment.

The father of testatrix had devised his entire estate to her for life, with remainder in fee to her children, if any, and empowered her, in the absence of children, to dispose of all the property by will, to be effective to pass the title as absolutely as he could by will, and testatrix, who died without issue, devised the annual income and profits, and the income and profits of the increase and accumulations, of said property to her husband for life, and empowered the husband "to dispose of all of said property and its increase of every kind and description by last will and testament duly executed," and provided further as follows, viz: "And said last will and testament so made by my said husband shall pass the absolute title to all said property of

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every kind and description, and its increase as completely as if so willed by me in pursuance of the power conferred upon me by my father's will."

Held, that the power conferred upon the husband to dispose of the property by will duly executed is not a delegation of the power vested in the testatrix by her father's will, but the creation of a distinct and original power appurtenant to the life estate given the devisee for life, to appoint the property in question, and the qualified estate thus given the husband is a less estate than that she was authorized to create by the will of her father, and is within the power therein vested in her.

FROM WILLIAMSON.

Appeal from the Chancery Court of Williamson County.—JOHN ALLISON, Chancellor.

EGGLESTON & EGGLESTON, for Mays.

R. N. RICHARDSON, H. H. COOK, H. P. FOWLKES and W. W. FAW, for Beech et al.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This bill is brought for the purpose of having the estate of the complainant in a valuable tract of land in Williamson county ascertained and decreed.

The lands were formerly owned by John Beech, and the controversy is between complainant, Mays, the husband of Jeannette Beech Mays, the only child of John

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Beech, who survived him, but is now dead, and the heirs at law of Mrs. Mays.

John Beech died previous to March, 1860, having first made and published his last will and testament, devising and bequeathing his entire estate to his daughter, Jeannette Beech, for life, with remainder in fee to her children, if any, and authorized and empowered her, in the absence of children, to dispose of all of the property by will in writing attested by three witnesses, to be effective to pass the title as absolutely as he could by will. In the event his daughter Jeannette should die without children, and without exercising the power given her to dispose of the estate by will, his executors were directed to sell the property, and divide the proceeds among the relatives of his daughter "who would have taken it upon her death under the laws of descent of Tennessee."

Jeannette Beech married complainant, F. H. Mays, and died without issue, having first made and published her last will and testament in the form directed in that of her father, which was duly admitted to probate, and is as follows:

"I, Jeannette Mays, wife of F. H. Mays and daughter of John B. Beech, deceased, late of Williamson County, Tennessee, pursuant to the power in me vested by the will of my said father, hereby make this my last will and testament, revoking all others.

"(1) If I shall die leaving issue, it is my will that the provisions of my father's will in this event shall be complied with.

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"(2) But if I shall die without children or issue of such it is my will that my said husband F. H. Mays, have the annual income and profits of all the property bequeathed to me by my said father, and the income and the profits of the increase and accumulation of said property, and the income and profits of all property purchased by the property and means bequeathed to me by my father, including the livery stable and property thereto attached in the town of Columbia, Tennessee, I desire that said profits, and income shall be paid over to and enjoyed by my said husband as the same shall accrue.

"(3) I hereby empower my said husband, F. H. Mays, and he is hereby fully vested with authority and power to dispose of all said property and its increase of every kind and description by last will and testament duly executed. And said last will and testament so made by my said husband shall pass the absolute title to all said property of every kind and description and its increase, so completely as if so willed by me in pursuance of the power conferred upon me by my father's will."

Complainant claims that under this will he acquired and is seised of an estate in fee in the lands disposed of by the testatrix.

While the contention of the defendants is that complainant is only entitled to the income and profits of the property during his life; that he has no power to devise it under the third clause of the will, because that clause is an effort on the part of the testatrix to delegate the power given her in her father's will to her husband, and

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is void for the reason that such powers are a personal trust and cannot be delegated; and that upon the death of complainant the property must be sold by the executors of John Beech, and distributed among the nearest relations of his daughter at her death, as provided in the third clause of his will.

We are of the opinion that upon a proper construction of the will of Mrs. Mays, complainant, F. H. Mays, is vested with an estate for his life in the property devised, with power to dispose of the remainder in fee by last will and testament duly executed.

We have not set out verbatim the power of appointment conferred upon Mrs. Mays, but that it authorizes her to dispose of all the property given her absolutely is conceded. The only question made is as to what extent the power was executed.

Mrs. Mays was authorized and empowered, without limitation, to dispose of the entire estate in fee; and it is well-settled law that, under a general power to appoint an estate in fee, the donee may appoint a lesser or qualified estate in the property, and that it is not necessary to execute the power in its entirety and to its full extent. This is held upon the principle that the lesser is included in the greater. It is not an excessive exercise of the power, but a partial execution of it, which has always been held to be valid.

In the case of *Butler v. Huestis et al.*, 68 Ill., 597, 18 Am. Rep., 589, Mr. Justice Scott, delivering the opinion of the court says:

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"The law seems to be well settled by authority, where a party has the power to appoint a fee, if there are any words of positive restriction, a less estate may be appointed. The appointment of a less estate than the donee might have created under the power is not thereby rendered void. . . .

"The deed of settlement required the appointment to be made by will, or an instrument in the nature of a will. There is, however, no restriction against appointing an estate to one party, less than a fee, and appointing the fee to another on the determination of the former."

And in *Lawrence's Estate*, 136 Pa., 354, 20 Atl., 521, 11 L. R. A., 85, 20 Am. Rep., 931, the donee of a general power to appoint in fee declared to certain uses for life, with remainder over, and it was held to be a valid execution of the power.

The cases of *Beardsley et al. v. Hotchkiss et al.*, 96 N. Y., 202-218, *Friend v. Oliver*, 27 Ala. (New Series), 534, *Wilson v. Wilson*, 21 Beavan's Reports, 28, *Steifel v. Clark*, 9 Baxt., 471, and *Williams v. Whitmore*, 1 Tenn. Cas., 250, are to the same effect.

The devise of the rents, profits, and income of the property to complainant for life is in effect a devise of the property itself for life. It is not a devise of the fee, for the intention to limit his estate to his life distinctly appears. *Johnson v. Johnson*, 92 Tenn., 563, 23 S. W., 114, 22 L. R. A., 179, 36 Am. St. Rep., 104.

The power conferred upon complainant to dispose of

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the property by will duly executed is not a delegation of the power vested in the testatrix by her father's will but the creation of a distinct and original power appurtenant to the life estate given the devisee for life, to appoint the property in question, and is valid.

In other words, the effect of the will of Mrs. Mays is to vest in her husband a limited and qualified estate in the property therein devised, for his own life, with the power to dispose of the remainder by will duly executed. This is a less estate than that she was authorized to create by the will of her father, and is within the power therein vested in her.

The case of *Bray v. Bree*, Clark & Finley's House of Lords Reports, vol. 2, p. 453, is directly in point. The syllabus of this case concisely states the facts and the question decided. It is in these words:

"By indenture or settlement a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survives the husband, should appoint. There was one child only of the marriage, and the wife, surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and, in default of appointment, to the child's executors or administrators. The child, by her will, appointed to the fund, and died. *Held*, that the power in the settlement was well exercised by the wife, and that the child's appointment

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by her will carried to her appointee after the death of the wife."

In the case of *Phipson v. Turner*, 9 Simons' English Chancery Reports, 287, a testator bequeathed a certain sum in the public funds for all, or such one or more, exclusive of the others, of the children of his niece as she should by will appoint, and, in default of appointment, in trust for all of her children living at his death. The niece by her will appointed £6,000 of the funds to her daughter, for her separate use for life, and after her death to such persons as she (the daughter) should by will appoint, and, in default of appointment, to her brothers. The daughter made a will, and, in exercise of the power given her by her mother, appointed the fund to her husband absolutely; and it was held that the testamentary power of appointment given her was valid, and the appointment to her husband sustained.

In *Moses v. Martin*, 34 Beavan's Reports, 500, a father, under a power conferred upon him by will to appoint to his children by will, duly executed, with a further disposition in default of such appointment, appointed a share to a daughter for life, for her separate use, with remainder as she should by her last will appoint; and it was held that this was a good execution of the power conferred upon him.

These authorities fully sustain the view we have taken of the rights of the parties.

The decree of the court of chancery appeals is reversed, and that of the chancellor affirmed, with costs.

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MORROW v. BAIRD.

(Nashville. December Term, 1904.)

1. **COVENANTS.** General warranty of title. Runs with land. Doctrine reaffirmed.

The doctrine is well settled in this State that a covenant of general warranty of title runs with the land, and consequently any subsequent vendee who is evicted may sue for the breach.

Cases cited and approved: *Hopkins v. Lane*, 9 Yerg., 79; *Lawrence v. Senter*, 4 Sneed, 53; *Kenney v. Norton*, 10 Helsk., 384; *Mette v. Dow*, 9 Lea, 96.

2. **SAME.** Same. Intermediate vendor may maintain action against his vendor, if forced to discharge liability to his vendee.

An intermediate vendor, who has been forced to discharge his liability to his vendee, evicted by paramount title, may maintain an action for reimbursement against his vendor, whose deed to him also contains a general warranty of title.

Cases cited and approved: *Allen v. Little*, 36 Me., 170; *Van Court v. Moore*, 26 Mo., 98; *Booth v. Starr*, 1 Conn., 244; *Withy v. Mumford*, 5 Cow. (N. Y.), 137; *Thompson v. Shattuck*, 2 Metc., (Mass.), 618; *Suydam v. Jones*, 10 Wend., 184; *Thompson v. Sanders*, 5 T. B. Mon., 357; *Redwine v. Brown*, 10 Ga., 311.

3. **SAME.** Same. Eviction necessary to maintain action, but may be implied and not actual.

The covenant of warranty is not broken without eviction by paramount title, but eviction by judgment at law is not necessary. The warrantee may voluntarily yield possession to him who has a better title and sue his warrantor for a breach of the covenant; but in such case he does so at his peril, and the burden of proof is upon him to show the paramount title.

Case cited and approved: *Callis v. Cogbill*, 9 Lea, 139.

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FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

GEO. E. BANKS, T. A. EMBRY and W. H. WILLIAMSON,
for Morrow.

ZARECOR & TURLEY for Baird.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

This is a bill by an intermediate vendor of land against his immediate grantor for breach of covenant of title. A demurrer was interposed on behalf of the defendant, which was sustained by the chancellor, and complainant's bill dismissed. The cause is before this court on appeal of the complainant, assigning the action of the chancellor in dismissing his bill as error.

Complainant, Morrow, alleges in his bill that on the 22d day of June, 1888, he purchased of defendant, Baird, for the consideration of \$5,000, a tract of land in Franklin county, Tennessee, estimated to contain 5,000 acres. Baird executed to Morrow a deed, which was duly acknowledged and recorded in the register's office of

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Franklin county. The deed contained a covenant to warrant and defend the title to the tract of land to complainant, his heirs and assigns, against the lawful claims of all persons whomsoever.

On the 12th day of July, 1894, complainant, Morrow, sold the land to John T. Long, and covenanted in his deed to warrant the title to the same. On the 28th of October, 1897, while John T. Long was in possession of said land, Albert H. Sears filed a bill in the chancery court of Franklin county enjoining the said John T. Long from entering upon or cutting the timber on 219 acres of said land. The bill alleges that said suit was prosecuted to a final decree, and that Sears recovered of Long 219 acres of the tract of land which complainant, Morrow, had purchased from defendant, Baird, and which complainant, Morrow, had conveyed by warranty deed to the said Long.

It is further alleged in the bill that one Isaac Gray, while said Long was in possession of the land, filed a bill against him in the chancery court of Franklin county, seeking to recover 450 acres of land which had been conveyed by the complainant, Morrow, to the said Long, and that upon Gray showing superior title to the land claimed by him the said Long, complainant's vendee, purchased from said Gray the 450 acres at the price of \$450, and was also forced to pay the costs of Gray against Long, the money being paid on June 8, 1898, viz., \$450 for the said 450 acres of land, plus \$17.40, the costs of the cause.

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It is further alleged that thereafter, on the 4th day of March, 1899, complainant's vendee, Long, filed a bill in the chancery court of Franklin county enjoining complainant, Morrow, from proceeding to collect the purchase money notes which had been executed by Long to complainant, Morrow, for the land which the latter had sold to the former. Complainant, Morrow, answered said bill and filed a cross bill seeking to collect from Long the purchase money notes which Long had executed to him. In that case on the final hearing Long recovered of complainant, Morrow, the price which he had agreed to pay for the 450 and 219 acres lost by the superior title of Sears and Gray, respectively.

The allegations of the bill, when laid in a narrow compass, are that on the 28th day of June, 1888, Baird sold and conveyed the land in controversy by warranty deed to the complainant Morrow. The latter, on the 12th of July, 1894, by warranty deed, sold and conveyed the land to John T. Long. In October, 1897, one Albert H. Sears established by a bill in equity a superior title to 219 acres of this land, and Long was thereby forced to pay the real owner the value of the land so recovered. Subsequently one Isaac Gray brought suit against Long to recover 450 acres of the land so conveyed, and upon his showing a superior title Long purchased his interest. Morrow was then forced to reimburse Long for the land he had lost on account of the superior titles of Sears and Gray. Morrow now sues Baird, his vendor, for breach of warranty of title, and to recover the money

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so paid to Long. As already stated, a demurrer to this bill was interposed on behalf of the defendant Baird, assigning for cause:

(1) That the bill shows the breach of covenant for which suit is brought was in the time of complainant's vendee, John T. Long, and complainant cannot therefore maintain this action.

(2) It does not appear from the bill that complainant, Morrow, had discharged his liability to his vendee, Long.

(3) Defendant demurs to so much and such parts of the bill as seeks to recover for the 450 acres of land alleged to have been lost upon eviction by paramount title.

The chancellor sustained the demurrer, and dismissed the complainant's bill, as already stated. Complainant appealed, and has assigned errors. The cause is heard directly by this court without the intervention of the court of chancery appeals, under a new rule, which excludes from the assignment of equity causes to the court of chancery appeals all cases standing on bill and demurrer.

The first assignment is that the chancellor erred (1) in holding that an evicted grantor cannot recover for a breach of covenant warranty, notwithstanding the fact that he, before bringing the suit, discharged his liability to his grantee; (2) In holding that an action cannot be maintained upon a covenant of general warranty to recover damages accruing on account of an eviction by paramount title; (3) in holding that complainant had not discharged his liability to his vendee.

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The main contention presented by the demurrer is that the right of action for the breach of warranty of title is in the grantee during whose time the breach occurred, and that it is not competent for an intermediate grantee who has aliened the land to maintain the action.

The question presented is one of first impression in this State, so far as any reported opinion of this court shows. The industry of counsel and our own examination has failed to find any adjudication by this court on the precise question here presented.

The doctrine is well settled in this state that covenant of general warranty of title runs with the land, and consequently any subsequent vendee who is evicted may sue for the breach. *Hopkins v. Lane*, 9 Yerg., 79; *Kenney v. Norton*, 10 Heisk., 384; *Mette v. Dow*, 9 Lea, 96.

In *Kenney v. Norton*, supra, it was said that when one purchases land and receives a conveyance for the same he thereby becomes assignee by virtue of the conveyance merely of the warranty of title contained in the deed to his vendor, and that he may sue for breach thereof, whether made to such previous vendor and assigns or not, and that, as the covenant relates to the land, he only who is owner of the land at the time of the breach can take advantage of it. The court continues: "That is to say, in the language of Mr. Rawle, in his work on Covenants for Title, p. 335: 'The owner of the land for the time being is entitled to the benefit of all the warranties and covenants which the prior owner in the claim

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of title may have given.'” Or, in other words, in cases of successive warranties of title to land, the last vendee with warranty may maintain an action for breach of covenant against the first or any other warrantor. *Lawrence v. Senter*, 4 Sneed, 53; *Mette v. Dow*, 9 Lea, 97.

But in these cases the action for breach of warranty was brought by the vendee in possession of the land at the time the breach occurred. The question with which we are now dealing was not adjudicated. The question is whether an intermediate vendor, who has been forced to discharge his liability to his vendee evicted by paramount title, may maintain an action against his vendor for reimbursement.

We are of opinion that such an action may be maintained, and that the chancellor was in error in sustaining the demurrer of the defendant.

Mr. Rawle, in his work on Covenants for Title, section 215, says:

“It may therefore be considered as settled in accordance with principle and authority that where one has parted with all his interest in land he parts also with all right to or control over the covenants which run with it, and he can only regain that right over them by being made liable upon his own covenants and satisfying that liability;” citing *Allen v. Little*, 36 Me., 170; *Van Court v. Moore*, 26 Mo., 98.

The author cites the leading case of *Booth v. Starr*, decided in Connecticut in 1814 (1 Conn., 244, 6 Am. Dec., 233), wherein it was held that the right of action

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of an immediate purchaser who had himself parted with all interest in the land did not depend merely upon his prospective liability to the purchaser from himself, but that it could not be enforced until that liability should have been fixed by the recovery of damages by them and their actual payment by him.

In the present case, said Swift, J., delivering the opinion of the court:

"The grantee or covenantee of the plaintiff has been evicted; but plaintiff has never been sued, nor has he paid the damages. The question is whether, under these circumstances, he can maintain the action against the defendant, who is his immediate covenantor. The last assignee can never maintain an action on covenant of warranty till he has been evicted. Though the title may be defective, though he may be constantly liable to be evicted, though his warrantor may be in doubtful circumstances, yet he can bring no action on the covenant till he is actually evicted, for till then there has been no breach of the covenant, no damage sustained. By a parity of reasoning, the intermediate covenantees can have no right of action against their covenantors till something has been done equivalent to an eviction; for till then, they have sustained no damage. . . . In the present case the plaintiff cannot know that his covenantee, who has been evicted, will ever sue him. He may bring his action directly against the defendant. A recovery in this suit and payment of damages will be no bar."

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The case of *Booth v. Starr* was cited and quoted with approbation in the subsequent case of *Withy v. Mumford*, 5 Cow. (N. Y.), 137. The reason of the rule seems to be to prevent the obvious injustice which would arise from making prior vendors liable to all the subsequent owners in turn, and thus pay damages more than once for the same breach of covenant. The principle that the intermediate covenantee can never sue till he has satisfied the damages was adopted to prevent such an injustice.

Mr. Washburn, in his work on Real Property, vol. 3, p. 503, recognizes the general rule that action for breach of covenant of warranty of title should be brought by the owner of the land, and as such the assignee of the covenant at the time it is broken. The author states, however, "that an exception as to who may sue for a covenant of warranty exists where the covenantee has himself conveyed the premises with warranty, and his grantee, upon being evicted, sues and recovers of him, instead of suing the original covenantor, as he might have done. In such case the first covenantee, upon satisfying the claim of the second, is remitted to his claim against his covenantor upon the original covenant. And this would be true if there had been a succession of conveyances with warranty on the part of any one or more of the successive grantors. The tenant who is evicted may, in such case, sue any prior covenantor; and if he elects any one but the first, and obtains satisfaction for his claim, such covenantor may thereby stand as to any prior cov-

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enantor in the place he held before he had parted with the estate, and sue upon his covenant, as if the breach had occurred during his ownership."

The author cites in support of the text *Withy v. Mumford*, 5 Cow. (N. Y.), 137; *Thompson v. Shattuck*, 2 Metc. (Mass.), 618; *Suydam v. Jones*, 10 Wend., 184, 25 Am. Dec., 552; *Thompson v. Sanders*, 5 T. B. Mon., 357; *Booth v. Starr*, 1 Conn., 244-249, 6 Am. Dec., 233; *Redwine v. Brown*, 10 Ga., 311-317.

It is insisted, however, that it does not appear from the bill that complainant, Morrow, has discharged his liability to his vendee, Long. It is distinctly alleged in the bill that in a litigation between Morrow and Long the latter recovered of complainant the price which he had agreed to pay for the 450 and 219 acres above mentioned. We infer from this language that said claim has been satisfied.

The third ground of demurrer was to so much of the bill as sought to recover for the 450 acres of land alleged to have been lost to Gray, because it did not appear that such loss was upon eviction by paramount title.

It is alleged in the bill that one Isaac Gray filed a bill against complainant's vendee, Long, to recover 450 acres of land embraced in the deed from Baird to complainant, and that, upon Gray showing a superior title to the land, complainant's vendee, Long, purchased it for the consideration of \$450.

In *Callis v. Cogbill*, 9 Lea, 139, this court said :

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“While the general rule requiring an eviction has always been held in Tennessee, the principle has been extended to implied or legal evictions, and is not confined to literal and actual dispossession;” citing with approval Wait’s Actions and Defenses, vol. 2, p. 389, wherein it is said: “Although the covenant of warranty is not broken without eviction by paramount title, yet eviction by judgment at law is not necessary. The tenant may voluntarily yield the possession to him who has a better title, and claim for a breach of the covenant.”

It was further said in *Callis v. Cogbill* that: “The rule is founded on the sound principle that the vendor, having himself parted with the possession, and put his vendee in his place, he is bound to his warrantor in good faith to retain that possession which may ripen into a perfect title, except as against a paramount title shown to exist, and if he surrenders the possession he must be prepared to justify such surrender by clearly making out the fact authorizing his act.”

For the reasons indicated, the decree of the chancellor is reversed, the demurrer overruled, and the cause remanded for an answer.

Battier v. State.

BATTIER V. THE STATE.

114	563
f117	702
117	703

(Nashville. December Term, 1904.)

1. **BILL OF EXCEPTIONS.** Every part must be authenticated by the trial judge.

In order to make extraneous matters a part of the record, they must be examined by the trial judge, and authenticated by his signature in such manner as to make their identity certain. Parts of a bill of exceptions may be in the form of exhibits to be inserted in their proper places, according to the directions given therein; but all of the bill of exceptions, whether in one or more documents, must be present and examined when it is signed by the judge, and the several papers to be copied must be so marked as exhibits that no mistake in their identity can be made, and it must not be left to the clerk, or other person, to determine what constitutes any part of the record.

Cases cited and approved: Wynne et al. v. Edwards, 7 Humph., 419; Weakley v. Pearce, 5 Heisk., 415; Jones v. Stockton, 6 Lea, 184; Nance v. Chesney, 101 Tenn., 471.

2. **SAME.** Same. Parts not thus authenticated will be stricken out by supreme court.

When extrinsic matters, which can only be made part of the record by bill of exceptions, appear in the transcript without proper authentication, they cannot be considered by the supreme court, but will be stricken out when called to its attention.

See cases cited under headnote 1.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson County.—W. M. HART, Judge.

Battier v. State.

HARRY S. STOKES, for Battier.

ATTORNEY-GENERAL CATES, for the State.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This case is before us upon a motion of the attorney-general, predicated upon a certified copy of the bill of exceptions as it was when filed in the criminal court of Davidson county, to strike from the transcript certain portions thereof purporting to be the proceedings in that court had upon an application for a continuance of the case, the evidence introduced upon the trial, and the charge of the court, because not properly a part of the bill of exceptions tendered by the plaintiff in error, and signed by the trial judge and filed.

The bill of exceptions, called by the plaintiff in error a "skeleton bill of exceptions," when signed and filed was as follows:

"State of Tennessee vs. Paul Battier.

"Upon the case being called for trial defendant moved the court for a continuance on grounds afterwards embodied in affidavit with permission of the court. The State resisting said motion stated: (Here insert.) Thereupon counsel for defendant prepared and read said affidavit. (Here insert.) In response to said affidavit counsel for state said: (Here insert Trans. p. 91.) The court held the affidavit stating the grounds insufficient, and overrule said motion, and court said:

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'Well, I reckon we are about as near ready now as we ever will be.'

"Upon the trial of this case the following evidence was submitted to the jury:

"(Here insert transcript of evidence.)

"This was all the evidence. The court thereupon charged the jury as follows:

"(Here insert the charge of the court.)

"Defendant made and argued before the court a motion for a new trial (here insert), which was by the court overruled.

"To the action of the court in overruling the said motion the defendant excepts, and prays an appeal at the next term of the supreme court at Nashville, which is by the court granted.

"The defendant tenders this, his bill of exceptions, to the judgment of the court overruling his motion for a new trial, which is signed and sealed, and ordered to be made a part of the record.

"W. M. HART, Judge."

What purports to be the affidavit offered by the plaintiff in error in support of his application for a continuance, the evidence introduced upon the trial in the criminal court, and the charge of the court, appear in the transcript in the places where, in the form set out, they are directed to be inserted; and the object of the motion is to have these portions of the transcript stricken out, because they do not appear from the bill of

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exceptions to be in any manner identified and authenticated by the trial judge as parts of it.

This motion must be sustained. It is well settled that, in order to make extraneous matters a part of the record, they must be examined by the trial judge, and authenticated by his signature in such manner as to make their identity certain.

In the case of *Wynne et al. v. Edwards*, 7 Humph., 419, Judge Turley, speaking for the court said:

"But there is an unanswerable objection to a reversal of this judgment. There is no bill of exceptions by which the bond becomes a part of the record, and we cannot, therefore, notice it. There is an order upon the minutes by which it is directed that the bond and proceedings thereon be made a part of the record; but this will not do. Before extraneous matter can become part of the record, it must be examined and authenticated under the hand and seal of the judge. It is a high exercise of judicial power to make extraneous matters part of the record, and, if it be not exercised with great care, may be productive of great mischief. Therefore it is required that, if extraneous matter be in parol, it must be included in a bill of exceptions; if it be in writing, it must be either introduced into or appended to the bill of exceptions in such a manner as that the authentication of the judge will reach it. Upon what principle, then, can a judge make an order that deeds, bonds, notes, depositions, etc., shall become a part of the record, and leave it to the clerk to certify them and authenticate

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them? It is his duty to do it himself. Much mischief might result from such a practice, and we cannot support it.

"If the bond and proceedings thereon had been spread upon the minutes, they necessarily having to be signed by the judge, the bond and proceedings would have been authenticated by him, and the clerk could not possibly make a mistake in sending them up."

The rule here announced has been frequently followed and approved by this court. *Weakley v. Pearce*, 5 Heisk., 415; *Jones v. Stockton*, 6 Lee, 133; *Nance v. Chesney*, 101 Tenn., 471, 47 S. W., 690.

This record presents a strong case for its application. It does not appear from the bill of exceptions that the evidence introduced or the charge of the court had even been reduced to writing. It does not appear that the affidavit and the papers containing the evidence and charge, if in writing, were presented as a part of the bill of exceptions, or present when it was signed. They are not in any way described so that they could be identified by the clerk in making the transcript, as the particular papers which were examined by the trial judge and directed to be copied into the bill of exceptions. They are in no way authenticated by the signature of the judge. Their identification is left to the clerk without any direction or guide to control him.

It is not necessary that a bill of exceptions be contained in one document. Parts of it may be in the form of exhibits to be inserted in the proper places, according

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to the directions given therein; but all of the bill of exceptions, whether in one or more documents, must be present and examined when it is signed by the judge, and the several papers to be copied must be so marked as exhibits that no mistake in their identity can be made, and it must not be left to the clerk or other person to determine what constitutes any part of the record. The enforcement of this rule is absolutely necessary in order to secure a certain and accurate record of the proceedings of trial courts, and no relaxation of it can be allowed. When extrinsic matters, which can only be made part of the record by bill of exceptions, appear in the transcript without proper authentication, they cannot be considered by this court, but will be stricken out when called to its attention.

The motion of the State is sustained.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1905.

UNION RAILWAY COMPANY V. GILBERT D. RAINE.

(Jackson. April Term, 1905.)

1. **EMINENT DOMAIN.** Amounts for value of land taken and for incidental damages to the remainder should be reported separately.

In proceedings under eminent domain laws to condemn land, the amounts awarded for the value of the land taken and for the incidental damages to the remainder of the land should be reported separately by the jury, though a joint judgment for both may be rendered.. (*Post*, pp. 571, 572.)

2. **SAME.** Incidental damages estimated as though the land taken was occupied by as many railroad tracks as is practicable.

In proceedings under eminent domain laws to condemn land for railroad purposes, the incidental damages to the land not taken should be assessed as if the land taken was occupied with as many railroad tracks as practicable; and the fact that the railroad company does not contemplate such immediate occupation and use thereof cannot alter the measure of damages. (*Post*, pp. 572, 573.)

Railroad v. Raine.

Cases cited and approved: Alloway v. Nashville, 88 Tenn., 510; Railroad v. Telford, 89 Tenn., 293; Railroad v. French, 100 Tenn., 209.

3. **SAME.** Incidental damages lessened by incidental benefits by access of existing railroads, by crossing tracks of proposed railroad, to remaining land valuable for manufacturing sites.

Where, in proceedings under eminent domain laws to condemn land for railroad purposes, it appeared that the land not taken was valuable for manufacturing sites, and that the several existing railroads running in front of it had the right to build spur tracks across each other and over the proposed road in order to reach any manufacturing plant thereon, the jury should be instructed that in estimating the incidental damages they must consider that none of the existing roads were cut off from access to the property by the construction of the proposed road, and the failure to incorporate such instruction in the original charge, or to give such instruction upon a special request therefor, is reversible error. (*Post*, pp. 573-577.)

Code cited and construed: Secs. 1489, 1504, 1857 (S.); secs. 1249a, 1562 (M. & V.); secs. 1119, 1338 (T. & S. and 1858).

4. **SAME.** Quantity taken should be valued at its worth at that place and in that form.

In proceedings under eminent domain laws to condemn land for railroad purposes, an instruction to the jury that in assessing damages for the land taken, it would not be reasonable to fix the price of the quantity taken at the general rate of the whole tract, as "this would be selling by retail, and ought to be at a higher price for the quantity taken," is erroneous because it does not follow that the sale of a small quantity would in all cases be at a higher price than the average price of the land as an entire tract, for when a small strip or portion of the land is taken, it ought to be valued at such price, for the quantity taken, as the jury deems it would be worth at that place and in

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that form, whether that be more or less than the value proved per acre for the whole tract. (*Post*, pp. 577, 578.)

Case cited and overruled: *Woodfolk v. Railroad*, 2 Swan, 438.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.
—J. P. YOUNG, Judge.

M'FARLAND & CANADA, for Railroad.

TURLEY & TUBLEY and CARROLL, M'KELLAR, BULLINGTON & BIGGS, for Raine.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is an action for condemnation of land for railroad purposes in the exercise of eminent domain. The right to condemn the land is not controverted, and the only question before us is the compensation that should be allowed the land owners as damages. There was a trial in the court below before the judge and a jury, and a verdict and judgment for \$5,000; and for this amount, and interest from the date of the occupation, judgment was rendered.

There is nothing to show definitely how much of this was given for the value of the land taken, nor how much

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was for incidental damages to the remainder of the tract.

As a matter of correct practice, these amounts should be reported separately by the jury, although a joint judgment for both together may be rendered.

The first assignment made is that the jury were instructed that they might estimate the damages incidental to the taking, as if the entire strip was occupied by as many tracks as practicable.

We are of the opinion that there is no error in this.

When a railroad asks to have land condemned for its purposes, it is presumed to ask for only so much as it may need for its purposes; and the damages should be assessed upon the theory or basis that the entire right of way asked for is intended to be devoted to the purposes of the railroad, either at once or subsequently; and, inasmuch as the landowner can have only one assessment of damages, it is proper that the entire damages shall be given to him at the time the property is taken and the condemnation made. After taking the right of way, the railroad company has the right at any time to occupy every portion of the way taken that it may deem necessary for the purposes of the railroad. *R. Co. v. French*, 100 Tenn., 209, S. W., 771, 66 Am. St. Rep., 752.

The fact that the railroad company does not contemplate the immediate occupation and use cannot alter the measure of damages. See, also, *R. Co. v. Telford's Executors*, 89 Tenn., 293, 14 S. W., 776.

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As was said in *Alloway v. Nashville*, 88 Tenn., 510, 13 S. W., 123, 8 L. R. A., 123: "The owner is entitled to all of his damages—those to the land taken and those to the residue—so soon as the condemnation is made. Neither he nor the condemning party can await future developments to enhance or diminish the amount of the damages. These must be estimated on the assumption that the land appropriated will be properly and in a reasonable time put to the use for which it is condemned."

It is said that the court erred in refusing to charge the following charge requested by the plaintiff:

"In considering the possibilities of the uses to which this ground is adapted, you are instructed that you should not assume, that when these Union Railway tracks are constructed, this will prevent other roads on Broadway having access to the manufactories or industries that may be constructed on this land. The law makes the provision for one road crossing another to reach industries, and the contract between the city and the Union Railway provides for such crossings."

In order to understand the materiality of this request, it is necessary to give a description of the property, and the location of the road over it. The entire tract belonging to defendant, Raine, consists of 10.61 acres, lying on the south side of Broadway, near McGhee's Station, and is bounded on the west by Elmwood Cemetery, from which it is separated by Elmwood avenue. The entire tract is substantially the same kind of land, and the

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physical topography or contour of the strip taken is the same as the balance of the tract. The strip taken embraces about one-third of an acre, or, to be accurate, .36, and fronts 270 feet on Broadway, which is not a public street, but a general railroad right of way for various roads entering the city of Memphis, and is not used by vehicles at this place.

Before the plaintiff entered upon it, there were already five tracks located on Broadway, abutting the front of this property, to wit, two tracks belonging to the Frisco Road, two to the Southern, one to the Chattanooga Road, and now one to the plaintiff, Union Road.

The proof shows that the property is valuable for manufacturing sites, and it is conceded that the several railroads which run in front of it had a right to build switches and spurs across each other in order to reach any manufactories or industries that may be erected upon this land.

It is a question which is controverted whether these several roads, after the track of the Union Railway Company is laid between them and this property, will have the right to pass over the track of this Union Road in order to reach the property of such manufactories and industries as may be erected upon it.

There is proof tending to show that, if these roads have the right to cross the Union Railway with switches and spurs in order to reach this property, that fact will materially affect the question of damages to the remainder of the property caused by the building of the Union

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Railway tracks; and there is a strong intimation from one or more of the witnesses that, if the Union Railway tracks can be thus crossed, the remainder of the property would not be damaged, and therefore the actual damage to the landowner would be only the value of the land taken.

It is shown by the proof, to wit, the contracts with the city and its ordinances, that the Union Railway Company is authorized to construct switches and spurs in order to reach any manufactories or industries that may be erected upon this land, or upon any other along its line.

The contracts and ordinances of the city of Memphis were put in proof, in effect providing that any other railroad company should have the right to cross the tracks of the Union Railway Company to reach other railroads, industries, or shippers located upon either side of it, and that the Union Railway Company should have a like right to cross any other railroad for a like purpose.

It was contended by the defendant that this contract and ordinance did not apply to the locality in question.

As to whether it did or not was a question for the court to decide, upon a proper construction of the terms of the contracts and ordinances.

It was a very vital and material question, affecting the amount of the incidental damages, and the request was designed to obtain the instruction of the court as to the right of these different roads to cross the Union Railway tracks in order to reach this property.

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The instruction should have been given in the original charge, but, if omitted in that, it should have been given in response to the request.

The request embodies a true and proper construction of the contracts between the Union Railway Company and the city of Memphis, and of the ordinances before referred to; and the contracts and ordinances leave no doubt that the several railroads do have the right to cross the track of the Union Railway Company in order to reach this and other property.

In addition, our statute provides that all the railroads of the State have power to construct their roads so as to cross each other, if necessary, by main trunks or branches, or to unite with each other as with branches, Shannon's Code, section 1504.

Section 1489 also provides that any railroad may build lateral roads, not exceeding eight miles in length, extending from the main stem of said line of railroad to any mill, quarry, mine, manufacturing plant, etc.

This right to cross the track of the Union Railway Company in order to reach this and other property was an important one, to be considered in determining the question of incidental damages done to the remainder of the tract.

Our statute provides that incidental benefits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating incidental damages. Shannon's Code, section 1857.

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Now, if these several railroads, having tracks along Broadway, have the same right of access to this property that they had before the construction of the Union Railway Line, and the property gets also the benefit of the frontage upon the Union Railway Line, with the right to have tracks laid to it from that line, it may be a question whether the incidental benefits to this land do not equal the incidental damages, or to state the proposition differently, whether any incidental damages arise.

However this may be—and as to this we express no opinion—if there be such incidental damages, over and above the incidental benefits, they should be estimated upon the theory and basis that none of the roads are cut off from access to the property by the construction of the Union Line.

It is said that the court erred in instructing the jury as follows:

“You are likewise instructed that, in assessing the damages to the land actually taken by the Union Railway Company, it would not be reasonable or proper to fix the price of one acre or the fourth of an acre or tenth of an acre at the general rate of the whole tract or a larger quantity, or even to estimate so many square feet, taken at the general fair value of the whole tract. This would be selling by retail, and ought to be at a higher price for the quantity taken.”

This is the exact language of this court in the leading case of *Woodfolk v. N. & C. R. Co.*, 2 Swan, 438.

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Exception is taken to the latter sentence, the language of which is, "This would be selling by retail, and ought to be at a higher price for the quantity taken."

The argument is that this rule is an invasion of the province of the jury, since it does not follow that the sale of a small strip or parcel of the strip would in all cases be at a higher price than the average price of the land as an entire tract. And it is said that in the sale of a small part of the tract sometimes a higher price may be realized, and sometimes a lower price, and that it is a matter of common observation that a sale of an entire tract as a whole can usually be made at an advance over the price when the land is subdivided.

In other words, common experience is that the sale of land as an entire tract will generally bring more than if it is sold in small tracts or subdivisions.

We are of opinion that this criticism is well made, and a more accurate charge would be that, when a small strip or portion of the land is involved, it ought to be valued at such a price, for the quantity taken, as the jury deemed it would be worth at that place and in that form, whether that be more or less than the price proven per acre for the whole tract.

For the reasons indicated, we think there is error in the judgment of the court below, and the judgment is reversed.

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MRS. ANN E. TYRUS v. KANSAS CITY, FT. SCOTT & MEM-
PHIS RAILROAD COMPANY.*

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(*Jackson*. April Term, 1905.)

1. **VERDICTS.** May be directed by the trial judge where the facts are uncontroverted and there is no doubt as to conclusions to be drawn therefrom.

Where there is no controversy as to any material facts, the trial judge may instruct the jury to return a verdict in accordance with his view of the law applicable to such ascertained or uncontroverted facts; but there can be no constitutional exercise of the power to direct a verdict in any case in which there is a dispute as to any material evidence, or any legal doubt as to the conclusion to be drawn from the whole evidence, upon the issues to be tried. (*Post*, pp. 583-595, and especially pp. 593, 594.)

Constitution cited and construed: Art. 6, sec. 9.

Cases cited and approved: *Bacon v. Parker*, 2 Ov., 57; *Lannum v. Brooks*, 4 Hay., 121, 123; *Claxton v. State*, 2 Hum., 181, 183; *Johnson v. State*, 2 Hum., 283; *Ivey v. Hodges*, 4 Hum., 154, 155; *Graham v. Bradley*, 5 Hum., 476, 479; *Farquhar v. Toney*, 5 Hum., 502, 503; *Patton v. Allison*, 7 Hum., 335, 336; *Hughes v. State*, 8 Hum., 75, 78, 79; *Kirtland v. Montgomery*, 1 Swan, 452, 458; *McGavock v. Wood*, 1 Sneed, 185; *Marr v. Marr*, 5 Sneed, 388, 389; *Whirley v. Whiteman*, 1 Head, 616, 617; *Ayres v. Moulton*, 5 Cold., 154; *Ellis v. Spurgin*, 1 Heis., 76; *Lyon v. Guild*, 5 Heis., 177; *James v. Brooks*, 6 Heis., 158; *Railroad v. Campbell* 7 Heis., 260; *Insurance Co. v. Sturges*, 12 Heis., 339, 343; *Harrington v. Neely*, 7 Bax., 442; *Crabtree v. State*, 1 Lea, 267-270; *Robinson v. Railroad*, 2 Lea, 594; *Gregory v. Underhill*, 6 Lea, 207, 211; *Jones v. Iron Co.*, 14 Lea, 157, 158, 159; *Cantrell v. Railroad*, 90 Tenn., 638; *Hopkins v. Railroad*, 96 Tenn., 409, 443, 447, 456; *Greenlaw v. Railroad*, 6 Cates, 187.

* For rights as to flow of surface water, see note to *Gray v. McWilliams* (Cal.), 21 L. R. A., 593.

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2. **SURFACE WATER.** Facts to show it was gathered and thrown in greater force on plaintiff's land.

In an action for injuries to land caused by gathering surface water in a body and sending it through a culvert upon the land, the facts stated in the opinion were held to show that the defendant railroad company gathered the surface water that came upon its property into a body in its culvert and sent it in greater volume and with greater force than it was accustomed to flow upon the land of the plaintiff, and thereby injured it. (*Post*, pp. 581, 582, 595.)

3. **SAME.** Same. Liability in damages for gathering and throwing water upon land of another.

Where the defendant gathers the surface water that comes upon his land into a body in a culvert and sends it in greater volume and with greater force than it was accustomed to flow upon the land of the plaintiff, he is liable for the damages so caused. (*Post*, p. 595.)

4. **SAME.** Same. Same. Damages upon the basis of permanent injury for overflowing land, when.

In an action against a railroad for injury to land by the unlawful diversion of surface water upon the land by gathering it together in a culvert by the means of the lay of the land and the elevation of the roadbed, and throwing it in greater volume and with greater force than it was accustomed to flow upon plaintiff's land, the plaintiff is entitled to prove the extent of the impairment of the value of the property for the purpose of assessing damages upon the basis of permanent injury. (*Post*, p. 595.)

Case cited and approved: *Coleman v. Bennett*, 111 Tenn., 705, 714, 715, et seq.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.—
J. S. GALLOWAY, Judge.

Tyrus v. Railroad.

EDGINGTON & EDGINGTON, for plaintiff.

C. H. TRIMBLE, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought to recover damages for an injury alleged to have been inflicted by the defendant upon a lot belonging to the plaintiff by gathering surface water in a body and sending it through a culvert upon the lot referred to, whereby it was permanently injured.

The facts shown by the record are, in substance, as follows:

The plaintiff is the owner of lot No. 7, in block 61, in Ft. Pickering Addition to Memphis. This lot fronts north on Iowa avenue, and runs back south to an alley, and has a front of 45 feet and a depth of 177 1-2 feet. On the east lies lot No. 6, belonging to the Calhoun estate, and on the west lot No. 8, belonging to Mrs. Coffey. Lots 6 and 8 were originally higher ground than lot No. 7, and have within the last few years been made even higher by "grading up," as it is called, or filling them. Just west of block 61 lies Kansas avenue, running north and south. Along the avenue runs the defendant's line of railway. A few years ago the defendant constructed across Kansas avenue, under its track, just opposite the mouth of the alley before referred to, a stone culvert sixty feet long, and of a diameter four feet by two and one-half feet. Owing to the lay of the land, the culvert resting at the lowest place, and the obstruction,

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which the elevation of the road bed thrown up by the defendant offers to the passage of water, the culvert receives the drainage of about fifty-eight acres of land, and pours this water in one body into the alley above mentioned, and thence upon the plaintiff's lot, striking that lot at its south end, and running thence, northward, through the whole length of the lot to its northern margin where it escapes into a drain constructed by the city across Iowa avenue, with the result that through the erosive action of the water a gully six or seven feet in depth, and very wide, has been opened through the entire length of the lot, and nearly the whole surface washed off, rendering the lot practically worthless. Before the culvert was constructed, water from the surrounding lands passed over the plaintiff's lot, but more slowly, and not in such concentrated volume. It does not appear that the raising of lots 6 and 8 has had any appreciable effect in producing the injury complained of, but that the injury has been caused by the concentration of the water by means of the culvert. The culvert was properly constructed as a work of mechanical art, and as stated, was placed at the lowest level of the land, for purposes of surface drainage.

The plaintiff offered to show the extent to which the market value of the land had been impaired by the ditch before referred to, but was not permitted to do so, the evidence having been held incompetent by the court below.

The case was originally tried before a justice of the

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peace of Shelby county, resulting in a judgment of \$499 for the plaintiff. From this judgment an appeal was taken to the second circuit court of the county, and, on the trial in that court, his honor, Judge Galloway, gave the following charge to the jury:

"Gentlemen of the jury:

"This is an action brought by the plaintiff against the defendant railroad company to recover damages on account of defendant having committed a nuisance by improperly draining surface water upon the premises of plaintiff.

"The court charges you that the proof shows that the culvert in question, under the tracks of the defendant company's railroad, which was constructed for the purpose of carrying off the surface water and natural drainage, was properly constructed for that purpose—that it was constructed at the lowest point of natural surface water drainage of the adjacent land—and that no proof to the contrary has been submitted to the jury. You are therefore instructed by the court to return your verdict for the defendant."

In obedience to this instruction, the jury returned a verdict in favor of the defendant, and judgment was rendered thereon by the court against the plaintiff for the costs of suit, from which judgment she has appealed and assigned errors.

1. The first point made is that the court had no power, under our practice, to give a peremptory instruction to the jury.

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The question suggested by this assignment has come before the court so frequently during recent years, by the action of the circuit judges in sending up verdicts based upon peremptory instructions, that we deem it advisable to trace the history, and declare the state, of our law upon the subject.

Article 6, section 9, of the constitution of 1870, reads:

“Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.”

The same provision was contained in the constitution of 1834, and substantially the same provision in the constitution of 1796.

The question to be determined is whether the giving of a peremptory instruction to the jury is a violation of the foregoing constitutional provision.

Before taking up our cases, however, which bear directly upon the question, it will be found useful to state some general principles established by our authorities in respect of the relations existing, under our law, between the court and the jury.

It has been held that the provision quoted, “judges shall not charge juries with respect to matters of fact,” means that they shall not decide upon the credit of witnesses; they shall not state in which scale there is a preponderance; they shall not inform the jury what conclusion of fact, from the evidence heard, they ought to draw. *Johnson v. State*, 2 Hump., 283, 36 Am. Dec., 322. See, also, for further illustration: *Ivey v. Hodges*,

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4 Hump., 155; *Graham v. Bradley*, 5 Hump., 479; *Patton v. Allison*, 7 Hump., 335, 336; *Hughes v. State*, 8 Humph., 78, 79; *Farquhar v. Toney*, 5 Hump., 503; *Kirtland v. Montgomery*, 1 Swan, 458; *McGavock v. Wood*, 1 Sneed, 185; *Marr v. Marr*, 5 Sneed, 388, 389; *Ellis v. Spurgin*, 1 Heisk., 76; *Lyon v. Guild*, 5 Heisk., 177; *James v. Brooks*, 6 Heisk., 158; *L. & N. R. R. Co. v. Campbell*, 7 Heisk., 260; *Harrington v. Neely*, 7 Baxt., 442; *Robinson v. L. & N. R. R. Co.*, 2 Lea, 594.

"They may state the testimony;" that is, the judge may say the witness has said so and so, or you have heard and remember the facts stated by him. If you believe all those facts to be true, the law thereon is thus and thus. *Claxton v. State*, 2 Hump., 181, 183. He may state the testimony at large, but is under no obligation to do so. *Lannum v. Brooks*, 4 Hayw., 121, 123; *Harrington v. Neely*, 7 Baxt., 442; *Hughes v. State*, 8 Humph., 75, 79, par. 2.

"Declare the law" means that he is to charge the law arising upon the evidence. *Crabtree v. State*, 1 Lea, 267-270.

Upon the whole passage, the following occurs in *Ivey v. Hodges*, 4 Hump., 154, 155:

"This provision arose out of the jealousy with which our ancestors always looked upon any attempt on the part of the courts to interfere with the peculiar province of the jury—the right to determine what facts are proved in a cause—and to put a stop to the practice of summing up, as it was and is yet practiced in the courts

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of Great Britain, and, in all probability, in the colonies before the Revolution, and which consists in telling a jury not what was deposed to, but what was proved. This, the framers of our constitution considered a dangerous infraction of the trial by jury and they prohibited it by express terms. 'Judges shall not charge with respect to matters of fact;' that is, shall not state to the jury what facts are proved. To do so is error, for which a case must always be reversed. But not being disposed to withhold from the jury any proper aid which the judges may be enabled to render them in every investigation, they have provided that they may state the testimony; that is, may, for the purpose of refreshing the memory of the jury, inform them what facts the different witnesses have deposed to, leaving them to judge of the truth thereof, and to draw their deductions therefrom."

The following principles are stated in *Whirley v. Whiteman*:

"In trials by jury the court is to decide questions of law, and the jury questions of fact. What are called mixed questions, consisting of both law and fact, as questions in respect to the degree of care, skill, diligence, etc., required by law in particular cases are to be submitted to the jury under proper instructions from the court as to the rules and principles of law by which they are to be governed in their determination of the case. The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be de-

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terminated by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient in point of law to maintain the allegations in the pleadings, and this must be done in one of two modes: Either the court must inform the jury, hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegations; or the jury must find the facts specially, and then the court will apply the law and pronounce whether or not the facts so found are sufficient to support the averments of the parties." 1 Head, 616, 617.

We shall now direct our attention to the precise question in hand.

We had, prior to the last term at Nashville, no case in this State which formally approved the practice of giving peremptory instructions to juries; but there are cases in our reports, as far back as December term, 1844 (*Graham v. Bradley*, 5 Humph., 476; *Farquhar v. Toney*, 5 Humph., 502), wherein it appeared that the circuit judge gave peremptory instructions to the jury, and this court refused to reverse, stating as the ground of refusal, in substance, that, if such instruction was an invasion of the province of the jury, it was a harmless invasion in the particular case, since there was no controversy in the evidence, the correct conclusion had been reached, and no injury had been done. In *Jackson Insurance Co. v. Sturges*, 12 Heisk., 339, the question for

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examination was whether a certain draft had been presented with due diligence. In discussing the charge of the court, Nicholson, C. J., said: "It is true that, upon a state of facts not controverted, it would have been the business of the court to determine whether they constituted reasonable diligence or not; but when the facts are disputed, and the testimony conflicting, the court can do no more than state the general principles of law applicable to the case, and leave the jury to apply them to what they may determine to be the facts." *Id.*, 343. *Jones & Son v. Cherokee Iron Co.*, 14 Lea, 157, was a case in which the circuit judge gave a peremptory instruction. There was a controversy of fact in the record, and the instruction was held erroneous. Upon an assignment made to the findings of the court of referees, before which tribunal the case had been tried on appeal, that the report wrongfully fails to show that there were no controverted facts, this court said:

"The plaintiff below excepts to this part of the report because the referees fail to show the fact that there was no disputed fact, and therefore no issue, and because they fail to report that, even according to their own showing, the defendants below were not entitled to any abatement of the note. The object of the exception is to make the point that the error of the charge is not sufficient to reverse on, if it appears that the defendant has no defense. This court has occasionally acted upon this rule where the verdict and judgment were in favor of the defendant, and it clearly appeared that the plaintiff

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could in no event be entitled to a recovery according to his own showing. . . . The reason why the decisions are all in cases where the judgment has been in favor of the defendants is, obviously, because the plaintiff's case is more readily reducible to a single point. The defendant may rely upon the weakness of his adversary's case, as well as upon his defenses proper, and it can rarely happen that his rights turn upon a single point. If, however, the case should occur that the defense was narrowed to a point, and was clearly not sustained by the proof, the same rule would no doubt be applied. The mere fact that all of our decided cases are of the class mentioned would not, therefore, be conclusive of the present case. . . . But no case can fall within the rule which is not perfectly clear." *Id.*, 158, 159.

In *Cantrell v. Ry. Co.*, 90 Tenn., 638, 18 S. W., 271, a case of controverted facts, wherein this court held that the circuit judge acted erroneously in giving a peremptory instruction to the jury, the syllabus correctly states the substance of the decision, as follows: "For the court to direct the jury to return a verdict in favor of either party, where there is any conflict in the evidence is an invasion of the province of the jury, for which the case will be reversed."

In *Hopkins v. Railroad*, 96 Tenn., 409, 34 S. W., 1029, 32 L. R. A., 354, a kindred question was considered—whether the practice of demurring to the evidence existed in this State. In the course of the decision of that question the court incidentally discussed two other ques-

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tions—the right of the trial judge to direct an involuntary nonsuit, and the right to give a peremptory instruction to the jury. In that discussion it was shown that the practice of directing an involuntary nonsuit prevailed in the following States, viz.: California, Connecticut, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New York, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Wisconsin. It was shown that the practice of giving peremptory instructions, or directing a verdict, prevailed in the following states, viz.: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, New Jersey, North Carolina, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin. It was said in that case (page 456 of 96 Tenn., page 1040 of 34 S. W. [32 L. R. A., 354], citing *Bacon v. Parker*, 2 Overt., 57), that it had been decided that an involuntary nonsuit could not be entered in this State. In respect of the right to direct a verdict in this State, it was said (page 447 of 96 Tenn., page 1038 of 34 S. W. [32 L. R. A., 354.]) The Tennessee cases cited by counsel for plaintiff in error, in respect of the right of the trial court to direct a verdict, are not controlling in this case. These cases presented controverted questions of fact material to the settlement of the issue, which belong exclusively to the jury. Such were the cases of *Kirtland*

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v. *Montgomery*, 1 Swan, 452; *Ayres v. Moulton & Read*, 5 Cold., 154; *Robinson v. R. R.*, 2 Lea, 594; *Gregory v. Underhill & Newson*, 6 Lea, 207; *S. E. Jones & Son v. Cherokee Iron Co.*, 14 Lea, 157; *Cantrell v. R. R.*, 90 Tenn., 638, 18 S. W., 271." It was shown also in this review that in many of the States the practice of demurring to the evidence was permitted, and the general result drawn from the examination of the authorities was that: "In every State of the Union the judge is allowed to withdraw a case from the jury whenever there is a destitution of any competent, relevant, and material evidence to support the issue, and this authority is exercised either by directing a verdict sustaining a demurrer to the evidence, or enforcing a compulsory nonsuit, as the practice may prevail in the particular State. This fact is incontestable, and is abundantly shown in the overflow of cases already cited." Page 443 of 96 Tenn., page 1037 of 34 S. W. (32 L. R. A., 354):

In that case it was held that the demurrer to the evidence was the method recognized in this State for the granting of relief in the situation outlined in the excerpt.

So the matter has rested in our reports since that decision was rendered at the December term, 1895, subsequent decisions constantly referring to and applying that case. Meanwhile, however, the court, especially during recent years, has had brought to it very frequently cases wherein the circuit judges had directed verdicts. Where there was any material controversy in the evi-

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dence, the court has disposed of these cases by remanding for a new trial; where there was no material controversy, they have been settled on the principles laid down in *Graham v. Bradley*, *Farquhar v. Toney*, *Jackson v. Sturges*, and in the excerpt above copied from *Jones & Son v. Cherokee Iron Company*.

Finally, in the case of *W. B. Greenlaw, Administrator, v. L. & N. R. Co.*, 6 Cates, 187, 86 S. W., 1072, the question came again before the court. In that case, in an opinion prepared by Mr. Justice Wilkes, it was said:

"This court has had a number of cases before it in which the trial judge has, after a consideration of the entire record, directed the jury what verdict to return; and, although the court has not in express terms approved the practice, it has said in a number of cases that, if the trial judge has arrived at a correct conclusion, the verdict of the jury, and judgment of the court, based upon his instruction, will not be disturbed. *Graham v. Bradley*, 5 Humph., 476; *Farquhar v. Toney*, 5 Humph., 502; *Robinson v. Railroad*, 2 Lea, 594; *Gregory v. Underhill*, 6 Lea, 211; *Jones v. Cherokee Co.*, 14 Lea, 157. There are a number of cases in our books which seem to hold that the practice of directing a verdict does not prevail in Tennessee. Undoubtedly, in other jurisdictions, the weight of authority is that such a practice is proper, and conducive to the prompt and proper determination of legal controversies. Practically the same result is reached by a demurrer to the evidence, and it is difficult to see why the practice of directing a verdict is not war-

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ranted by reason, as much so as is the practice of demurring to the evidence. Indeed, in its practical application, it is more simple, direct, and easily understood, and better calculated to do justice. . . . The practice of demurring to the evidence was in disuse in this State for a long number of years, until quite recently, and now prevails quite generally, and we think, with beneficial results. In the practical application of the two modes of procedure, as we have before stated, directing the verdict appears to be the more direct and easily understood, and is not fraught with such summary results to the party demurring as is the case when the demurrer is not sustained. We think, however, that, whenever the jury is directed to return a verdict, it should be upon a consideration of the entire evidence in the case, and not upon any detached portion of such evidence."

The case last cited must be regarded as finally establishing the practice referred to which has been struggling for authoritative recognition for so many years.

That case, however, did not call for a statement of the limitations of the rule under our constitution, and that phase of the matter was not presented.

The following we conceive to be a sound statement of the matter within the restrictions of our constitution: Where there is no controversy as to any material fact, there is nothing for the jury to find; the question is then solely one of law for the court, and in such a case the court may instruct the jury to return a verdict in accordance with his view of the law applicable to such

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ascertained or uncontroverted facts. There can be no constitutional exercise of the power to direct a verdict in any case in which there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence, upon the issues to be tried.

As here stated, the rule is in accord with the substance and spirit of all our previous practice, and is but a harmonious part of a system. That is, if there is any dispute as to any material fact, the case must go to the jury; if there is no dispute as to such facts, the question is one of law for the court. If the case is one triable by the jury, the court below may set aside the verdict, on motion for new trial, if he deem the preponderance of the evidence to be against it. If he refuse to grant a new trial, and the case is brought to this court, and the decision here turns upon the facts, the judgment of the lower court will be permitted to stand, if there is any evidence in the record to support the verdict; if there is no evidence in the record to support the verdict, this court, will, upon proper assignment to that effect, reverse the judgment, and remand the cause for a new trial. In the latter aspect of the matter, on motion properly made in the court below for a peremptory instruction, and an improper refusal of it by the trial judge, this court would be enabled to dispose of the case finally, and thereby save to the parties and to the governmental agencies of the State the delay and expense of an additional trial, in the absence of any reversible error in rulings upon evidence or otherwise.

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In disposing of this question, we have deemed it useful to make a careful examination of all our authorities bearing upon the subject, and a reference to the more important of them, not only for our instruction, but in deference to the truth that the continuity of judicial thought is of the highest importance in every sound system of law, and the only rational basis for a true and natural development and improvement in principle and practice.

2. Although we have held that in a proper case the trial judge may direct a verdict, yet we think his honor, on the facts of the present case, improperly exercised that power. The facts stated in the beginning of this opinion show that the defendant gathered the surface water that came upon its property into a body in its culvert, and sent it, in greater volume and with greater force than it was accustomed to flow, upon the land of the plaintiff, and thereby injured it. The defendant had no right to do this, and for so doing became liable in damages for the infliction of the injury. See authorities cited in note 3, p. 595, 21 L. R. A.

3. The circuit judge erred in refusing to permit the plaintiff to prove the extent of the impairment of the value of the property for the purpose of assessing damages upon that basis. The injury being a permanent one, the damages should have been assessed upon that basis, once for all, rather than upon the theory of an injury to the use by recurrent acts which may be abated. This distinction is taken, and the subject fully discussed, in *Coleman v. Bennett*, 111 Tenn., 705, 714, 715, et seq., 69 S. W., 734, to which we refer.

Reverse and remand for a new trial.

Box Co. v. Moore.

MENGAL BOX COMPANY v. MOORE & M'FERRIN *et al.**

(*Jackson*. April Term, 1905.)

1. **TIMBER.** Contract of permission to cut and remove timber for five years, but no longer, confers no right thereafter to remove logs previously cut.

Contract of permission to enter upon certain described lands and to cut and remove therefrom all the cottonwood trees standing or lying thereon for a period of five years, with right of ingress and egress for said period, but after which there shall be no right nor timber cut on said lands, confers right and title to such trees, timber, or logs only as have been cut and actually removed from the land before or by the expiration of the five-year limit, and confers no title to, or right thereafter to remove, any trees or logs previously felled and cut. (*Post*, pp. 598-608.)

Cases cited and approved: *Hodges v. Buell* (Mich.), 95 N. W., 1078; *Utley v. Lumber Co.*, 59 Mich., 263; *Richards v. Tozer*, 27 Mich., 451; *Walt v. Baldwin*, 60 Mich., 626; *Burch v. Lumber Co.* (N. C.), 46 S. E., 24; *Holt v. Mills*, 54 N. H., 109, 121; *Strasson v. Montgomery*, 32 Wis., 52; *Golden v. Glock*, 57 Wis., 118; *Salt-onstall v. Little*, 90 Pa., 422.

Case cited and distinguished: *Carson v. Lumber Co.*, 108 Tenn., 681.

Cases cited and disapproved: *Kingsley v. Holbrook*, 45 N. H., 313; *Macomber Case*, 108 Mich., 491.

2. **SAME.** Same. Conveyance of land subject to timber contract substitutes grantee to rights of grantor, including timber cut, but not removed within time limit, when.

A deed of conveyance of lands, subject to an existing contract of permission to cut and remove trees thereon at any time within a certain period of five years, passes to the grantee not only the lands and the growing trees thereon, but substitutes him

*As to conveyance of title to standing timber without conveying title to land, see note to *McRae v. Stillwell* (Ga.), 55 L. R. A., 513.

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to all the rights which the grantor had in the lands, subject to such timber contract, including the right to the timber felled and cut thereunder previous to the execution of such deed, but not removed from the land within the five-year limit. (*Post*, p. 608.)

3. **SAME.** Same. Same. Purchaser of land subject to timber contract may recover logs removed after time limit, though cut before his purchase, if confused with logs cut thereafter.

Where a party, under a contract of permission to cut and remove trees from land within a period of five years, cuts trees both before and after a conveyance of the land subject to his contract, and fails to remove them within the limited period of five years, but removes them afterwards, and mingles and confuses them, the grantee in the deed of conveyance may recover all of them under the doctrine of mixing and confusion. (*Post*, p. 608.)

FROM LAUDERDALE.

Appeal from the Chancery Court of Lauderdale County.—JOHN S. COOPER, Chancellor.

DRAPER & RICE and RANDOLPH & RANDOLPH, for complainant.

MYERS, BANKS & APPERSON, for defendants.

MR. JUSTICE WILKES delivered the opinion of the Court.

This is an action of replevin for a number of saw logs. The chancellor decided in favor of the complainant; and the defendants have appealed.

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The facts, so far as necessary to be stated, are that on the 3d of October, 1898, J. C. Marley made a contract with J. H. Evans concerning the cottonwood timber on a tract of 2,358 acres of land in Lauderdale county. This contract, by a regular chain of conveyances or transfers finally vested in the defendants Moore & McFerrin. In March, 1903, before the expiration of the contract made by Marley with Evans, the Mengal Box Company bought of Marley the whole of the land from which the timber was to be cut. All of the contracts were regularly registered, and the deed from Marley to the Mengal Box Company recited the contract made by Marley with Evans, and the conveyance to the box company was made subject to that contract.

The contract had a five-year limit for cutting and removing the timber, and, about six months after the expiration of this limit, Moore & McFerrin were proceeding to remove certain cottonwood logs from the premises, when they were replevied by the Mengal Box Company. The replevin suit was brought in April, 1904, and resulted as before stated.

The contract between Marley and Evans is in these words:

"For and in consideration of the sum of \$2,538.00, on the following payments, to wit: I, Jo. C. Marley, have given and granted, and by these presents do give and grant unto the said J. H. Evans, permission to enter upon and cut and fell any and all cottonwood trees now standing and growing upon the following described

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tract of land, situate in the county of Lauderdale and the State of Tennessee, with the privilege of cutting and removing said cottonwood timber for the term of five years from this date, with this exception: That the said Evans is to release all claim on as much as two hundred acres each year, so that the same may be leased or cleared. The title of all the other kinds of timber is retained by me. The said Evans is to have the right of ingress and egress on said land for his said term, after which time he is to have no right or cut any timber on said land. Said Evans is to have and own all cottonwood timber, both standing and now down, that he may cut and remove within said five years from said land. And I warrant the title of said timber, and I will not give any other person a right to cut or remove any cottonwood timber from said land during said five years.

"Witness my hand, this 3d day of October, 1898, Jo. C. Marley."

The deed from Marley to the Mengal Box Company contains the following recital and reservation:

"But it is understood that I sell to the said Mengal Box Company the second described tract of land subject to the contract which I have heretofore made with J. H. Evans, for the sale to him of all cottonwood timber on said tract of land, giving him five years from the third day of October, 1898 in which to remove the same, which contract is registered in the register's office at Ripley, Tennessee, in Book J. J. pages 10 and 11, it being en-

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cumbered only by the said Evans right to remove said timber."

There was a covenant in the deed of seisin and right to convey, and against incumbrances, except by the timber contract with Evans, as above set out, and some taxes which the box company agreed to pay.

It appears that before the time limit had expired, of five years from the date of the contract, Moore & McFerrin had cut or caused to be cut into saw logs all or virtually all the saw logs replevied in this suit, and there are several hundred more saw logs cut and ready to be removed from the land.

The logs, when replevied, were not on the land, but had been removed therefrom by Moore & McFerrin, and were rafted in Coal creek, ready to be floated, when a rise should come, to market.

The only question of importance in the case is the proper construction and effect to be given to the contract entered into between Marley and Evans.

Moore & McFerrin claim that under this contract the title to all the cottonwood logs which were cut before the expiration of the time limit of five years, beginning October 3, 1898, vested in them; and, inasmuch as the trees were felled and cut into saw logs before the expiration of their five year limit, they had a right to remove the logs after the expiration of that time.

Quite a number of cases are cited on both sides bearing upon the question of the rights of the parties under con-

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tracts made for the cutting and removing of standing trees.

We are of opinion that the language of the contract in this case admits of but one construction, and we need not consider the nice distinctions which have been made in the cases, bearing upon the question of such contracts.

We think the contract means that Evans should become the owner and have the title to all the logs which should be cut and removed before or by the expiration of the five-year limit; but, in order to give him the ownership and to entitle him to such logs, they must not only be cut (that is, the trees felled and the logs cut into lengths), but the logs must be removed from the premises before or by the expiration of the five-year limit; and, after the expiration of that time, Evans would have no right to either fell any trees, cut any logs, or remove them after being cut, or to remove any logs that have been previously cut.

The contract gives Evans permission to enter upon the lands, and to cut and fell all cottonwood trees standing and growing upon them, with the privilege of cutting and removing the timber, for the term of five years, with the exception that Evans was to release all claim on as much as two hundred acres each year, so that the same might be leased and cleared. "The title to all other kinds of timber is retained by me." This means that all timber, except such cottonwood trees as had been cut and removed from the premises within the time limit, should remain in Marley.

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The contract further says: "The said Evans is to have the right of ingress and egress on said land for his said term, after which time he is to have no right or cut any timber on said land."

This means that he should have no right of ingress and egress to the land for any purpose after the expiration of the five-year limit, nor should he cut any timber on the land after that time.

In further confirmation on this construction, the contract provides as follows: "Said Evans is to have and own all cottonwood timber, both standing and now down, that he may cut and remove within said five years from said land."

This means that he should obtain no title to any of the cottonwood timber unless it was both cut and removed within the five-year limit.

The contract further says: "And I warrant the title of said timber, and I will not give any other person a right to cut or remove any cottonwood timber from said land during said five years."

The expression, "And I warrant the title of such timber," refers to such timber as Evans might cut and remove within the five years, and only extends to such timber; the said Evans having no interest in any other.

This, we think, is the plain meaning of the contract, and its language admits of no other interpretation.

While the authorities are somewhat conflicting as to the rights of the vendor and vendee in cases of contracts for the cutting and removal of timber growing upon

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lands, we think there are no cases in which the language is the same as the language in this contract, or similar thereto, where it has been construed differently from the meaning which we attach to this contract.

The seeming conflict between many of the cases arises out of the difference in the terms and language of the contract, and the words used in expressing the same.

In our own State we have no direct authority upon the exact question involved.

In the case of *Carson v. Lumber Co.*, 108 Tenn., 681, 69 S. W., 320, it was held that under a contract for the sale of standing trees, which contained no provision for the cutting and removing the same, the grantee has the right, implied by law, to enter upon the lands and cut and remove the same within a reasonable time, but not after the lapse of such reasonable time; and, under the peculiar facts of that case, the court was of opinion that a period of ten years from the date of the contract was a reasonable time for cutting and removing the timber under the contract.

That case is to be differentiated from this, in that there was a sale of all the standing trees, which vested the absolute title to the same, and no time limit was fixed, within which to cut and remove the timber; but here a mere permission was given to go upon the land and cut and remove the timber, and this cutting and removal must, by the contract, be made within five years from the date of the same, and the title to the timber

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did not pass until it was cut and removed, under the express language of the contract itself.

The general rule of law applicable in such cases is thus laid down in the twenty-eighth volume of the American & English Encyclopedia of Law (2d Ed.), 541:

"Contracts for the sale of standing trees, to be removed within a specified time, have generally been construed by the court as sales of only so many trees as the vendee might cut and remove within the time designated; the balance remaining the property of the vendor."

To sustain the text are cited cases from Georgia, Maine, Massachusetts, Michigan, Minnesota, and New York. The text adds:

"Such a sale may, however, be regarded as absolute, and the agreement to remove as a covenant, in which case the timber remains the property of the purchaser, although not removed within the time provided for."

And for this text are cited cases from Alabama, Michigan, and Massachusetts.

An examination of these cases will show that they are founded upon contracts whose language is different from the language of the present contract.

There are some cases which hold, apparently, a different doctrine—notably the case of *Kingsley v. Holbrook*, 45 N. H., 313, 86 Am. Dec., 173, and the *Macomber Case*, reported in 108 Mich., 491, 66 N. W., 376, 32 L. R. A., 102, 62 Am. St. Rep., 713.

But we are not satisfied with these cases, and the *Macomber* case appears to be modified and questioned in

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the later case of *Hodges v. Buell* (Mich.), 95 N. W., 1078.

In *Utley v. S. W. Wilcox Lumber Co.*, 59 Mich., 263, 26 N. W., 488, certain timber was sold, to be cut and removed within a specified time; and the court held, in substance, that after the expiration of that time the purchaser was entitled to only such logs as had been cut and were actually removed from the land within the time limit.

To the same effect, see *Richards v. Tozer*, 27 Mich., 451; *Wait v. Baldwin*, 60 Mich., 626, 27 N. W., 697, 1 Am. St. Rep., 551.

In the case of *Burch v. Elizabeth City Lumber Company*, 46 S. E., 24, the Supreme Court of North Carolina said:

"Under a contract conveying all the timber on certain lands, and allowing the grantee five years within which to cut and remove the same, whether viewed as a release or as a conveyance of the timber, and whether the title passed upon the execution of the conveyance, or not until the timber is cut and removed, the right of the grantee to cut and remove the timber terminates with the five-year period mentioned in the instruction, and he then has no further interest therein."

In the case of *Hoit v. Stratton Mills*, 54 N. H., 109, 20 Am. Rep., 119, which seems to hold a doctrine different from the one herein laid down, it is said at page 121 of 54 N. H. (20 Am. Rep., 119):

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"If the deed conveyed the trees on condition that they be removed within a reasonable time, or conveyed only such trees as should be removed within that time, then the trees not removed within that time did not pass with the deed, but remained the property of the landowner."

In the case of *Strasson v. Montgomery*, 32 Wis., 52: "Provided always and these presents are upon this express condition, that the party of the second part shall take all of said trees and timber off of said land within four years from this date."

In construing this contract, the court said that the defendant had no right to cut and remove the timber after the expiration of the four-year limitation in the deed to White.

Following this case, the court in the case of *Golden v. Glock*, 57 Wis., 118, 15 N. W., 12, 46 Am. Rep., 34, said:

"As stated, in substance, in *Strasson v. Montgomery*, the legal effect of the instrument was to convey all the trees and timber designated which should be removed within the time prescribed, and such as remained thereafter should belong to Allen or his grantee of the premises. Such being our construction of the deed, we hold . . . that the plaintiff has no right to any of the trees and timber not removed from the premises prior to April 20, 1880, at which time the limitation in the deed under which he claimed expired."

In the case of *Saltonstall v. Little*, 90 Pa., 422, 35 Am. Rep., 683, the language in the deed was this: "Also

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reserving unto the parties of the first part hereto, their heirs and assigns, all the pine timber on the aforesaid six tracts of land, together with the right and privilege to cut, remove, take, and carry away the same, or any part thereof, at any and all times, also the right of ingress and egress at all times, for the space of twelve years from the date first above written, for the purposes aforesaid."

The court said:

"Whether we regard the clause in controversy as a reservation or an exception, the result is the same, for in either event Kingsbury, or his grantee of the timber, was restricted to twelve years within which to cut and remove it. It was the reservation of the timber for twelve years, and no longer. After that time the trees remaining passed with the grant of the soil to which they were attached."

These authorities support the conclusion at which we have arrived, and which we think is obvious and plain, without the aid of authorities, from the terms of the contract itself.

It does not definitely appear whether the logs in question were all cut after the sale of the land to the Mengal Box Company or not, but the evidence tends to show that they were cut after that date. This is only important as bearing upon the question of title in the Mengal Box Company to the logs in controversy, and its right to bring a replevin suit to recover them.

We are of the opinion that, by the deed executed by

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Marley to the box company to the land, the title to all the trees standing upon it at that time passed to the box company, subject to be defeated only if Moore & McFerrin should cut and remove them, or any of them, before the expiration of the time limit.

The effect of this contract of sale and conveyance to the box company was not only to transfer the land and the growing trees upon it to the company, but was also to substitute the company to all the rights which Marley had in the land, subject to the contract made with Evans.

If it should be true that some of the logs had been cut before the sale to the box company, and that the result was to make them personalty, so that they would not pass with the conveyance of the land, still they were mingled and confused by Moore & McFerrin with the other logs cut after the conveyance to the box company; and in such a case, under the doctrine of mixing or confusion of goods, the box company would have a right to recover the whole of them.

It was evidently the intention of Marley, in his conveyance of the land to the box company, to substitute them to all his rights in and to the timber upon the land, whether cut or standing; subject to the contract with Evans.

We are of opinion, therefore, that there is no error in the decree of the chancellor, and it is affirmed, with costs.

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UNION RAILWAY COMPANY v. MRS. E. M. HUNTON *et al.*

114	609
117	232

(Jackson. April Term, 1905.)

1. **EMINENT DOMAIN.** Lessee is necessary party to condemnation proceedings.

In condemnation proceedings under eminent domain laws, lessee of the land sought to be condemned for public use is a necessary party. (*Post*, pp. 613, 614.)

2. **SAME.** Assignment of error for permitting a lease to be used as an absolute criterion for value is too general, when

An assignment of error, on appeal in condemnation proceedings under eminent domain laws to condemn land for public use, that the court below erred in permitting a lease to one of the defendants to be used as an absolute criterion for value cannot be entertained so far as it makes the point as a general one, directed to the whole record, because too general. (*Post*, pp. 614-617.)

3. **SAME.** Value on rental basis proved by witness on cross-examination, when.

Where, under condemnation proceedings under eminent domain laws to condemn land for public use, a witness testifies, upon his examination in chief, that the property in question is worth a certain sum, and that a fair rental value of the property would be six per cent. of its value, it is proper to prove by him, upon cross-examination, what he would consider a fair cash value of the property in view of the fact that it is leased for a number of years at a certain sum per year. (*Post*, pp. 616-618.)

4. **SAME.** Rental value to be considered in determining value of property.

In condemnation proceedings under eminent domain laws to condemn land for public use, the rental value of the property is one consideration to be looked to in determining the value of the land taken. (*Post*, pp. 618, 621.)

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Case cited and approved: McKinney v. Nashville, 102 Tenn., 137-140.

5. **SAME.** After judgment of condemnation, contention that defendant is entitled to no damages cannot be made at subsequent term, when only amount of damages is involved.

Where, in condemnation proceedings under eminent domain laws to condemn land for public use, a judgment of condemnation is passed, the question made by petitioner that one of the defendants who claimed an interest under a lease, was entitled to no damages, is not open to examination at a subsequent term, when the court has under consideration merely the question of the amount of damages. (*Post*, pp. 618, 619.)

6. **WITNESSES.** Refusal to permit cross-examination appearing, upon statement of counsel, to be useless, is not error, when.

There is no error in refusing to permit cross-examination of a defendant as a witness, where counsel states that he does not hope to obtain anything by it, but to lay grounds for a contention or question that cannot, under the law, be made at the then stage of the proceedings. (*Post*, pp. 618, 619.)

7. **EMINENT DOMAIN.** Error to reject evidence showing lease obtained for speculation in expected condemnation proceedings. In condemnation proceedings under eminent domain laws to condemn land for public use, it is error to refuse to permit petitioner to show that a lease of the property, held by one of the defendants, was not obtained with a view to its use and enjoyment, but as a means of speculation in the expected condemnation proceedings, and hence that such lease ought not to be taken as a true and spontaneous expression of value. (*Post*, pp. 616, 617, 619-621.)

Case cited and approved: McKinney v. Nashville, 102 Tenn., 131, 138-140.

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8. PRACTICE. Cross-examination of rebuttal witness reopening the case for testimony in chief is properly refused.

Where it appears to the court, on the examination of a witness, in rebuttal, that if the cross-examination as to the original matter proposed is allowed to proceed, the court must again go at large into testimony in chief, there is no error in the court's refusal to permit the examination to proceed. (*Post*, pp. 621-624.)

Cases cited and approved: *Smith v. Britton*, 4 Hum., 201; *Story v. Saunders*, 8 Hum., 667; *Cash v. State*, 10 Hum., 114; *Hays v. Crawford*, 1 Hels., 87; *Morris v. Swaney*, 7 Hels., 595; *Forsee v. Matlock*, 7 Hels., 426; *Railroad v. Parker*, 12 Hels., 50; *Knights of Honor v. Dickson*, 102 Tenn., 255, 258, 259; *State v. Davis*, 104 Tenn., 501, 506, 507, 509.

9. SAME. Rejection of evidence of sale price of adjacent lands is error, when.

In condemnation proceedings under eminent domain laws to condemn land for public use, the rejection of testimony showing prices for which other lands in the neighborhood of the land in question were sold, within a reasonable time prior to the taking of the land involved, is error. (*Post*, pp. 624-627.)

Cases cited and approved: *White v. Hermann*, 51 Ill., 246; *Railroad v. Clark*, 121 Mo., 185; *Baltimore v. Smith*, 80 Md., 473; *Moale v. Baltimore*, 5 Md., 324.

10. WITNESSES. Refusal to allow answer to questions is not error where it does not appear what the answer would be.

Where the record fails to show what the answer of a witness would have been, an assignment of error for the court's refusal to allow witness to answer cannot be considered in the supreme court. (*Post*, pp. 627, 628.)

Cases cited and approved: *Pearce v. Suggs*, 85 Tenn., 724; *Truslow v. State*, 95 Tenn., 199; *Railroad v. Stonecipher*, 95 Tenn., 315; *Weeks v. McNulty*, 101 Tenn., 495; *Insurance Co. v. Scales*, 101 Tenn., 628; *Stacker v. Railroad*, 106 Tenn., 450; *Shugart v. Shugart*, 3 Cates, 179, 185.

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11. **SAME.** Same. Rule does not apply where entire line of competent evidence is ruled out, nor where the witness is held incompetent and not heard at all.

But the rule in the foregoing headnote does not apply where the trial judge rules out an entire line of competent evidence, or refuses to hear any examination thereon, just as it does not apply when he holds that a witness is incompetent, and refuses to hear him at all. (*Post*, pp. 627, 628.)

12. **SAME.** Refusal to permit witness to testify as to rental value of land, where the value of the land is involved, is error, when. Where, in condemnation proceedings under eminent domain laws to condemn land for public use, a witness testified that he had knowledge of two rental contracts of neighboring lots within a short time before the taking involved, and that, although he had no specific information of any other contract in that neighborhood, yet he was acquainted with the property there, and also had had many years' experience as real estate agent, and on these grounds that he believed he could state the rental value of the property in question, it was error to refuse to permit him to testify concerning the rental value of the land in controversy. (*Post*, pp. 628-630.)

Cases cited and approved: *Wray v. Railroad*, 5 Cates, 544, 555, 556; *Railroad v. Warren*, 137 U. S., 354; *Railroad v. Blake*, 116 Ill., 166, 167.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.
—J. P. YOUNG, Judge.

Railroad v. Hunton.

M'FARLAND & CANADA, for plaintiff.

WILKINSON & M'GEHEE and CARROLL, M'KELLAR, BULLINGTON & BIGGS, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

This was a condemnation suit brought by the Union Railway Company on the 25th of May, 1903, against the defendants, Mrs. E. M. Hunton and S. M. Wright, for the purpose of condemning a right of way two hundred feet in width across the property of the defendant Mrs. Hunton, fully described in the petition.

The defendant S. M. Wright was a lessee, having a lease upon the property executed April 29, 1903, for a period of ten years from May 1, 1903, to May 1, 1913, at a rental of \$500 per year. According to the terms of this lease the tenant was to keep down taxes, and to turn over to the landlord at the end of the term any improvements he might erect upon the land during the term. Having this claim to the premises in question, he was a necessary party to the proceeding.

The parties, therefore, who are the defendants in error, and who were the defendants named in the petition of the Union Railway Company for condemnation, are Mrs. E. M. Hunton, the owner in fee, and S. M. Wright, the alleged lessee.

In making the defendant, S. M. Wright, a party, and seeking the condemnation of the leasehold interest claimed by him at the time of the condemnation of the

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fee of Mrs. Hunton, the petition, as to the lease and the title of S. M. Wright thereunder, alleged as follows:

"Petitioner is advised that the said Wright wrongfully obtained whatever lease he has upon this land as against this petitioner, and in bad faith to it, and had been previously advised of the necessity of petitioner occupying this land for its roadbed, and had pretended to assist petitioner in the obtention of this right of way for its purposes, but, instead of doing so, secured this lease wrongfully to himself.

"Petitioner now makes the said S. M. Wright a party defendant hereto, in order that he may appear and set up whatever interest he has, and that upon condemnation of this land and determination of what compensation shall be paid for the taking of the same, this compensation may be distributed between the defendant Mrs. Hunton and the said S. M. Wright, if it appears that he has any interest in the said land."

The defendant, S. M. Wright, filed an answer to the petition for condemnation, in which, after denying the prior knowledge and fraud and bad faith charged against him, he continued:

"On the contrary, respondent avers that he obtained the lease in good faith, for the purpose of erecting a manufacturing plant thereon, and has already expended the sum of about \$800 in the erection of said plant; that the property is peculiarly valuable for the uses to which he desires to put it; that, being at the junction of several railroads above mentioned, it affords respondent splen-

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did opportunities to advertise the wares to be manufactured by him, and he states that it will be a great injury to him for the said land to be taken for the uses of the petitioners."

The court, upon the petition and the answers of the defendants thereto, appointed a jury of view, who assessed the damages to both of the defendants at \$5,500, \$1,000 of which was to go to the defendant and the lessee, Wright.

From this report of the jury of view all the parties, the petitioner and the defendants, appealed.

The case subsequently came on for trial before the circuit judge and a jury in the usual way, at the conclusion of which trial the jury returned a verdict in favor of Mrs. Hunton for \$7,650, with interest, and in favor of the defendant Wright for \$1,500 and interest.

Upon this verdict the court rendered judgment against the petitioner for said sums of \$7,650 and \$1,500, respectively, with interest, making a total of \$9,653.25, and all costs.

A motion for new trial was made and overruled, whereupon an appeal was prayed by the railway company to this court, and errors have been assigned.

The first, second, and sixth assignments all depend principally upon the contention of the petitioner that Wright's lease was procured under such circumstances as prevented it being properly considered as a fair expression of the rental value of the land by reason of the matter set forth in the excerpt above taken from the peti-

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tion. It was contended by the petitioner that Wright, having learned from the company that it deemed the land in question essential to the further progress of its road, and that it must be acquired either by purchase or condemnation, sought out Mrs. Hunton, and procured the lease from her, not with a view of really using it, but for the purpose of, and with the expectation of, reaping a profit out of the condemnation proceedings in the valuation of the lease; that the taking of the lease by Wright was a mere speculation, based upon the certainty that the property would soon be taken from him, and that he would thereby obtain a profit from the lease without bearing its burdens, or after having borne only a small proportion of its burdens.

Having reference to this contention, the appellant assigned errors 1, 2, and 6, as follows:

“(1) The court erred in permitting the alleged lease to the defendant S. M. Wright to be used as an absolute criterion for value, and to permit Le Master and all the other witnesses to state the value of the property predicated upon this alleged lease.

“(2) The court erred in not permitting the cross-examination of the defendant S. M. Wright with reference to the bona fides of his lease, and as to his having deliberately made the lease, and erected hastily certain improvements with a full knowledge of the fact that the railway company had surveyed the land in question, and was preparing to institute condemnation proceedings.”

“(6) The court erred in not permitting any testimony

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to be introduced upon the issue made in the pleadings as to the bona fides of the lease to S. M. Wright, and in not permitting all the facts and circumstances of the lease to be shown."

The first assignment, in so far as it makes the point as a general one, directed to the whole record, that the court allowed the lease to be used as an absolute criterion of value, cannot be entertained, because too general. In so far as it is directed to special questions and answers indicated under the assignment it is equally untenable.

The first question specified was not answered at all. In lieu thereof, after a ruling of the court, the following questions were asked, viz.: "What would you consider the fair cash value of property that produced this \$500 net per year? Q. By witness: Are you speaking now of this particular property? Reply of counsel: Any property that produced a yearly return of \$500 net. Ans. By witness: Of course, that would indicate a valuation of \$8,300." The witness had previously stated that a fair rental would be six per cent on the value of the property.

This witness had already been examined touching the various elements of value proper to be considered in cases of the character before the court, and had given his opinion that the property was worth \$3,000 an acre, or \$4,000 for the one and a quarter acres. The questions above set out were asked the witness on cross-examination for the purpose of testing the correctness

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of his previous opinion. The substance of the matter was that counsel for the defendant, cross-examining the witness, pressed upon his attention one especial element of value, or means of arriving at value, for the purpose of demonstrating the incorrectness of the opinion previously expressed by the witness. We are of opinion that this was a fair use of the point in question, inasmuch as the court has held that the rental value is one consideration to be looked to in condemnation cases. *McKinney v. Nashville*, 102 Tenn., 137-140, 52 S. W., 781, 73 Am. St. Rep., 859.

The questions and answers quoted in the brief from the testimony of Mr. Snowden are subject to the same explanation and disposition as that given in respect of the testimony previously considered—that of Mr. Le Master.

So much of the first assignment as concerns the infirmity of the lease as an element of value by reason of the circumstances under which it was taken will be considered in connection with the second and sixth assignments.

It is true, as complained in the second assignment, that the court below refused to allow the petitioner to cross-examine defendant Wright for the purpose of showing that he had procured the lease under the circumstances stated in the petition; but it is also true that this refusal of the court occurred after counsel for the petitioner had stated, in the same connection, in substance, that he did not hope to obtain anything by the cross-examination,

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and also after he had stated that his purpose was not to weaken the effect of the lease as evidence of the value of the land, but to lay grounds for denying to Wright any compensation at all for the lease. In view of these two statements of counsel, the court acted correctly in refusing the right to cross-examine upon the subject. If the counsel expected to obtain no benefit by the cross-examination, and so stated to the court, it would have been an idle thing to take up time in going through such an examination. For the same reason he could not hope to impair the lease in any way by such examination. Moreover, the time for wholly preventing a recovery on the part of Wright came to an end when the judgment of condemnation was passed at a former term of the court. The question was not re-examinable, for such purpose, at a subsequent term, when the court had under consideration merely the question of the amount of damages. At most the question of good faith could be gone into at that stage of the case only for the purpose of weakening the effect of the lease as an element in arriving at the value of the land.

This brings us to the sixth assignment. The following evidence pertinent to this assignment appears in the record, viz.:

Mr. Snowden testified that before Mr. Wright leased the property he came into the office of Mr. Fleming, the president of the company, and in his presence had a conversation with Mr. Fleming about the property. "He said," continued the witness, "that he had an option

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to lease it, or a proposition to lease it, and he wanted to know whether the Union Railway was going to buy it, because, he said, if they did he didn't see any use of his going on there, because he would have to move away again. Then I think he said he was thinking about buying it, too, but I am not certain on that point.

Q. But he came up to be informed before making the lease, to see whether the Union Railway would buy the property? Ans. Yes, sir. Mr. Fleming told him if the

Union Railway couldn't buy the property at a reasonable price, it was going to condemn the property; that he had to go through it. Q. What did Mr. Wright reply?

Ans. I don't remember exactly. Q. Do you remember

whether any maps or plats were exhibited? Ans. Yes,

sir. I remember that the plat was on Mr. Fleming's desk, and referred to several times during the conversation. Q. And Mr. Fleming assured Mr. Wright that

the road would go through there? Ans. Yes, sir."

This evidence was ruled out by the court below, notwithstanding a distinct statement upon the part of counsel for petitioner, in substance, that his purpose in offering it was to show that the lease was not obtained by Wright really with a view to its use and enjoyment, but as a means of speculation in the expected condemnation proceedings, and hence that such lease ought not to be taken as a true and spontaneous expression of value.

We think the evidence was admissible for this purpose, and its exclusion was error. In the case of *McKinney v.*

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Nashville, supra, while it was held that a lease might be looked to as an element in ascertaining the value of the property, yet that evidence might be heard that the amount contracted to be paid as rent was influenced by the fact that such property was procured for gambling purposes, and the apparent rental value thereby inflated. The principle is the same; that is, in the case referred to, the petitioner was permitted to show the special circumstances under which the lease was effected that impaired its evidentiary effect as a true expression or indication of the value of the property. So the special circumstances testified to by Mr. Snowden, above quoted, were proper matters for the consideration of the jury in the present case, for the purpose of enabling them to rightly estimate the Wright lease as a means of arriving at the value of the property. The circuit judge should have admitted the testimony, so limiting its application. The refusal of the court below to permit this evidence to go to the jury must have had a material effect in the determination of the cause, since the existence of the lease, and the amount of the rent therein agreed to be paid, figured very prominently in the evidence as a means of enhancing the value of the property, on the theory that ordinarily the amount of the rent may be treated as six per cent on the value of the property.

The third, fourth, and fifth assignments of error all rest upon a single ruling made by the circuit judge.

The substance of this matter is as follows: The rail-

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way company had introduced R. B. Snowden as a witness, who had testified that D. S. Rice, as agent of Mrs. Hunton, had employed him to assist in making a sale of the property in question a short time before the condemnation proceedings were begun, and had fixed \$4,000 as the price of the property, or the sum at which it should be sold. After the company had closed its evidence, the landowner, Mrs. Hunton, offered in rebuttal the said D. S. Rice, for the purpose of contradicting the above-mentioned statement made by Mr. Snowden. When so placed upon the stand, Mr. Rice denied that he had any such conversation with Mr. Snowden. The attorney for the railway company, after examining the witness upon the subject of the conflict between himself and Mr. Snowden, then proceeded to interrogate him, as to the price which Mrs. Hunton had placed upon the land when she put it in his hands for sale. He testified, in substance, that she had put a tentative price of \$6,000 upon it, but reserved the right to reject this price if she should subsequently change her mind; that is to say, Mr. Rice was not authorized to make a binding offer of this kind, she reserving the right to sign the contract herself before it should be regarded as complete. Considerable discussion arose among counsel in the presence of the court, and various questions were offered and suggestions made, which indicated that, if the examination were allowed to proceed, the court would again have to go at large into testimony in chief. Thereupon his honor cut the whole matter short, ruled out the above-mentioned

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testimony, and stated that the evidence of the witness then on the stand must be confined wholly to matters in rebuttal.

This action of the court is assigned as error. We do not think there was any error in this matter. In the case of *Smith v. Britton*, 4 Humph., 201, the court said :

“For the purpose of facilitating and expediting business, rules of practice have, from time immemorial, been adopted in all courts of justice. These rules, though not so binding and obligatory as those establishing rights, are, nevertheless, not departed from except at the discretion of the court, which discretion should not be exercised inconsiderately, and for trivial causes.

“Among other rules adopted is the one regulating the mode for the examination of witnesses. It is a very important one, and one of great antiquity. Without it the confusion in the examination of cases before a jury would be intolerable, and the prolixity of investigations interminable. It provides that the plaintiff shall, in the opening of the case, examine all his testimony which goes to establish his action. The defendant shall then introduce his proof upon his matters of defense, and his testimony rebutting the proof adduced by the plaintiff, and then the plaintiff any which may rebut that of the defendant, but nothing in chief but by the permission of the court, which permission, as we have said, ought not to be extended except for good and sufficient reason shown, lest the good which results from the rule be destroyed, and the evil intended to be obviated be visited up-

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on the court in its full force. The relaxing of the rule, then, is a matter of discretion with the court; and so difficult is it to reverse for the exercise of a discretion that many courts have refused to do so. But in this State it has been held that the wrong exercise of a legal discretion is a matter of error; but then it must be gross and palpable, and not subject to hesitation or doubt."

See, also, *Story v. Saunders*, 8 Humph., 667; *Cash v. State*, 10 Humph., 114; *Hays v. Crawford*, 1 Heisk., 87; *Morris v. Swaney*, 7 Heisk., 595; *L. & N. R. R. Co. v. Parker*, 12 Heisk., 50; *Forsee v. Matlock*, 7 Heisk., 426; *State v. Davis*, 104 Tenn., 501, 506, 507, 509, 58 S. W., 122; *Knights of Honor v. Dickson*, 102 Tenn., 255, 258, 259, 52 S. W., 862; 2 Elliott on Evidence, section 819, 808-812, 946, 949.

We do not think that the present case calls for any review of the discretion of the circuit judge. We can add nothing to what was said by Mr. Justice Turley in the excerpt above quoted, concerning the impolicy of lightly interfering with the discretion of the circuit judge in such matters.

The seventh assignment makes the point that the circuit judge erred in refusing to allow the petitioners to show the prices at which other lots in the neighborhood of the lot in question had been sold, within a reasonable time prior to the taking of the land involved in the present case by the petitioner, as a means of enabling the jury to place a proper estimate or valuation upon the land so involved.

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We think his honor committed error in this ruling.

In Lewis on Eminent Domain it is said: "The propriety of allowing proof of sales of similar property to that in question, made at or about the time of the taking, is almost universally approved by the authorities." Vol. 2, section 443, p. 963.

In Am. & Eng. Ency. Law, it is said: "The market value of any particular piece of land that has been taken is, of course, the general selling price in the same vicinity of similar lands. But as to whether this general selling price can be determined by considering the price that was paid in particular instances, there is a division of opinion among the courts. Many decisions—doubtless the greater weight of authority—hold that it is proper to consider the sales of similar property in the same neighborhood at about the same time." Vol. 10 (2d Ed.), p. 1155.

In *White v. Hermann*, 51 Ill., 246, 99 Am. Dec., 543, it is said: "It is urged that the court below erred in refusing to permit appellants to prove the value of other adjacent land just before the date of this instrument. As it was important that the jury should be informed of the value of the land in controversy at the time it is claimed to have been sold, we see no objection to permitting proof to be made of the worth of other property of equal quality lying near to and similarly situated to this at or near the date of the instrument, or even property of different quality in its immediate vicinity, leaving the jury to determine the difference in value."

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In *St. L., K. & N. W. Ry. Co. v. Clark*, 121 Mo., 185, 25 S. W., 192, 906, 26 L. R. A., 751, it is said :

"We think the evidence of sales of similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damages to which the owner was entitled. The value of property is ascertained largely from such sales, and the opinions of witnesses as to values are largely predicated upon them. It is best, when it can be done, to put the jurors in possession of all the facts from which values are ascertained, and allow them to draw the conclusion therefrom. Witnesses basing their opinions upon recent sales of like property are liable to exaggerate or underestimate values. In any consideration they are no more capable of deducing fair conclusions from the known facts than the jury. The object is to ascertain the general market value, and, if particular sales are made under exceptional circumstances, the fact can be shown, and the jury can determine its probative force. Certainly no more reliable method of determining the fair market values of land can be reached than that derived from *bona fide* sales of similar lands in the vicinity. The objection that such evidence raises collateral issues as to the character of the land sold and the circumstances of such sales is more than compensated for by its value in aiding the jury to a correct conclusion. The weight of authority supports this view."

In *Mayor, etc., of Baltimore v. Smith et al.*, 80 Md., 473, 31 Atl., 423, it is said: "We all know, from observa-

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tion, if not experience, that if inquiry is made as to the value of a lot on a certain street in a city or town, where other sales have been recently made, it is generally answered by naming the price realized at such sales. If twelve jurors are taken upon land to ascertain its value, with which they are unacquainted, the first question which is suggested to them is, 'What does land in this neighborhood sell for?' As was said in *Moale v. Mayor, etc., of Baltimore*, 5 Md., 324, 61 Am. Dec., 276, 'with a view to get at this [the value of the lot], the neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned.' The property sold may, owing to peculiar circumstances, have brought more or less than the real market value; but those circumstances can be explained, and, if it is similar in character, location, etc., and the sale was of a sufficiently recent date, and was not made under unusual conditions, the price realized would help a jury to reach a just and proper conclusion."

It is insisted by counsel for the defendants in error that the above matter is not presented in such way that the court can consider it, for the reason that the record fails to show what the answer of the witness would have been. We adhere strictly to the rule referred to as declared and illustrated in *Shugart v. Shugart*, 3 Cates, 179, 185; *Stacker v. Railroad*, 106 Tenn., 450, 61 S. W., 766; *Weeks v. McNulty*, 101 Tenn., 495, 48 S. W., 809, 43 L. R. A., 185, 70 Am. St. Rep., 693; *Insurance*

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Co. v. Scales, 101 Tenn., 628, 49 S. W., 743; *Truslow v. State*, 95 Tenn., 199, 31 S. W., 987; *R. R. v. Stonecipher*, 95 Tenn., 315, 32 S. W., 208; *Pearce v. Suggs*, 85 Tenn., 724, 4 S. W., 526. But it does not apply where the circuit judge rules out an entire line of competent evidence, or refuses to hear any examination thereon, just as it does not apply when he holds that a witness is incompetent, and refuses to hear him at all.

The eighth assignment presents the point that the circuit judge erred in refusing to allow the witness E. B. Le Master to testify concerning the rental value of the property or lot of land in controversy in this case.

Mr. Le Master testified that he had knowledge of two rental contracts of neighboring lots within a short time before the taking in the present case, and that, although he had no specific information of any other contract in that neighborhood, yet that he was acquainted with the property there, and also had had a great many years' experience as a real estate agent in the city of Memphis, and on these grounds that he believed he could state the rental value of the property in question.

We are of opinion that under these circumstances Mr. Le Master should have been allowed to state his opinion. It should be observed that, while it must appear that the witness had some knowledge of the matter whereof he speaks, so that the court may see his evidence will aid the jury, yet it is not necessary that he should fill the measure of a technical expert. *Montana Ry. Co. v. Warren*, 137 U. S., 354, 11 Sup. Ct., 96, 34 L. Ed., 681; *Chica-*

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go, etc. Ry. Co. v. Blake, 116 Ill., 166, 167, 4 N. E., 488; *Wray v. Knoxville, etc., Ry. Co.*, 5 Cates, 544, 555, 556, 82 S. W., 471, 474.

In 1 Elliott on Evidence, section 685, it is said: "Witnesses who are not strictly experts, as well as expert witnesses, may testify as to the value of property, real or personal, or as to the value of services in a proper case. They must, however, have some knowledge on which to base their opinion. If they have such knowledge, the fact that it is slight will go to the weight of their testimony, rather than to its competency; but if they are not acquainted with, or have no knowledge of, the matter in question, so that their opinion can in no way aid the jury, the court should refuse to permit them to give an opinion which would necessarily be a mere guess or conjecture."

Again, it is said in the same authority:

"Although ordinary witnesses may give their opinions as to value, it is universally held that experts may be called in a proper case for the same purpose, and when experts are so called it is not a necessary qualification to their competency that their knowledge should have come from observation of the particular article or real estate. 'It is difficult to lay down any exact rule in respect of the amount of knowledge a witness must possess, and the determination of this matter rests largely in the discretion of the trial judge.' But if the witness has no actual knowledge on the subject, and is no better qualified to judge than the jury, his opinion would be

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worse than useless, and the court may well decline to receive it." *Id.*, section 1109.

In the same authority, speaking to the subject of the admissibility of the opinions of nonexpert witnesses, it is said :

"It would be almost impossible to enumerate all the particular cases or instances in which the opinions or conclusions of ordinary witnesses are admissible. One of the most comprehensive statements upon the subject is found in an opinion of the supreme court of New Hampshire, where it is said: 'Courts and text-writers all agree that upon questions of science and skill opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions, and, things both moral and physical, too numerous to mention.' *Id.*, Vol. 1, section 676.

The ninth assignment of error is overruled. This in-

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volved merely a construction of the lease, and it is not contended that the construction was incorrect.

The tenth assignment is overruled. The matter copied from the charge in this assignment is not strictly correct, but the error is not sufficiently important to justify a reversal therefor. The same matter, with an additional sentence attached thereto, which made it reversible error, is fully considered in an opinion filed to-day in the case of *Union Ry. Co. v. Gilbert D. Raine*, 6 Cates, 569, 86 S. W., 857, to which refer.

The eleventh assignment of error is overruled. This same instruction also appeared, in substance, in the case last referred to, and it need not be further discussed here.

It results that for the errors committed in respect of the matters complained of in the sixth, seventh, and eighth assignments of error the judgment of the court below must be reversed, and the cause remanded for a new trial.

The costs of the appeal will be paid one-half by Mrs. Hunton and one-half by S. M. Wright.

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117 102**MEMPHIS STREET RAILWAY COMPANY v. W. B. JOHNSON.***(Jackson. April Term, 1905.)*

1. **APPEALS.** Errors reviewable and correctible in supreme court.

The supreme court can only pass upon matters which the record shows have been considered and adjudged by the trial court, and can review and correct only the errors which appear upon the face of the record proper, and those committed in allowing or overruling motions for new trials upon grounds brought into the record by bills of exceptions. (*Post*, pp. 636-638.)

2. **NEW TRIALS.** Motion for, made and overruled, is necessary to obtain relief on account of errors in the trial.

A motion for a new trial, made and overruled, is necessary in order to give the appellant relief on account of errors occurring in the trial of the case, which a bill of exceptions is required to bring into the record. (*Post*, pp. 638-640.)

3. **SAME.** Motion for, must be in writing and entered upon the minutes of the court, with the action of the court thereon.

The motion for a new trial must be reduced to writing and spread court thereon; and it is not sufficient that the motion, or the action of the court thereon, appears in the bill of exceptions. (*Post*, p. 640.)

Case cited and approved: Railroad v. Egerton, 98 Tenn., 541.

4. **SAME.** Rules of practice for presenting and disposing of motions for, may be prescribed by the circuit court.

The circuit and law courts have authority, by reasonable rules of practice, not inconsistent with the law, and applicable to such courts, to control the form and time in which motions for new trials shall be made and disposed of. (*Post*, pp. 640-641.)

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Code cited and construed: Sec. 6075 (S.); sec. 5009 (M. & V.); sec. 4237 (T. & S. and 1858).

Cases cited and approved: Mallon v. Manufacturing Co., 7 Lea, 62; Alexander v. State, 14 Lea, 91; Railroad v. Hendricks, 88 Tenn., 719; Patterson v. Patterson, 89 Tenn., 154.

5. **SUPREME COURT PRACTICE.** Rule limiting errors assignable to the grounds for new trials set out in the motion, when. The supreme court, by a rule of practice, may provide that the errors assignable upon the action of the trial judge in refusing a new trial in the circuit or law courts, shall be limited to such grounds for a new trial as were set out in the motion for that purpose in the trial court, regardless of the rules of that court. (*Post*, pp. 640, 641, 645.)

Code cited and construed: Sec. 6337 (S.); sec 5254 (M. & V.); sec. 4504 (T. & S. and 1858).

Cases cited and approved: Foster v. Burem, 1 Heis., 784; Riggs v. White, 4 Heis., 504; Denton v. Woods, 86 Tenn., 37; Wood v. Frazier, 86 Tenn., 500.

6. **SAME.** Same. Assignment of errors in supreme court limited to those assigned on motion for new trial under rule of lower court, when.

Under a rule of practice of the circuit court requiring all grounds for new trials to be stated separately in writing and entered upon the minutes of the court, and providing that all errors not so set out shall be considered as waived, all errors of the trial court not so assigned as grounds for a new trial in the motion made for that purpose are thereby waived, and assignments of error in the supreme court upon the refusal of the trial judge to grant a new trial cannot be predicated upon grounds not so assigned in the lower court. (*Post*, p. 641.)

Cases cited and approved: Wise v. Morgan, 101 Tenn., 273; Railroad v. Blair, 104 Tenn., 212.

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7. **NEW TRIALS.** Statement of grounds for, should be as specific and certain as the nature of the error complained of will permit.

The statement of grounds in the motion for a new trial must be sufficient to direct the attention of the court and opposing counsel to the error or irregularity relied upon to vitiate the verdict, and should be as specific and certain as the nature of the error complained of will permit. (*Post*, pp. 641-644.)

8. **SAME.** Objection in the lower court to the form of the motion for, is not necessary, when.

Objection to the form of the motion for a new trial need not be made in the lower court by the successful party, because the rules of practice of the character of that shown in headnote six are made in the interest of the public, and for the purpose of enabling the courts speedily and correctly to dispose of the cases pending in them, and such rules cannot be waived by litigants. (*Post*, pp. 641, 644.)

9. **SAME.** Insufficient statement in motion for; case in judgment.

The grounds for a new trial stated in the motion in these words: "(1) For error in the admission and exclusion of evidence; (2) The court erred in refusing the special instructions asked for by the defendant," are insufficient, for failing to set out the evidence or instructions, where there is a rule of the circuit court requiring all grounds for a new trial to be stated and set out separately in the written motion, and entered on the minutes of the court, and providing that all errors not so set out are presumed to be waived. (*Post*, pp. 636-645.)

Code cited and construed: Sec. 6075 (S.); sec. 5009 (M. & V.); sec. 4237 (T. & S. and 1858).

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FROM SHELBY.

Appeal from the Circuit Court of Shelby County.—J.
P. YOUNG, Judge.

WRIGHT, PETERS & WRIGHT and CARUTHERS EWING,
for Railway Co.

W. V. SULLIVAN and W. A. PERCY, for Johnson.

MR. JUSTICE SHIELDS delivered the opinion of the
Court.

This action is brought by W. B. Johnson against the
Memphis Street Railway Company to recover damages
for personal injuries sustained by him, through the neg-
ligence of the defendant, while plaintiff was a passenger
on one of its cars.

The case was submitted to a jury, and a verdict found
for the plaintiff. The motion of the defendant for a
new trial was overruled, and judgment entered. The de-
fendant tendered a bill of exceptions to this action of
the court, which was signed and filed, and the case is
now before us upon appeal in the nature of a writ of er-
ror.

The errors assigned are predicated upon the refusal
of the trial judge to set aside the verdict of the jury and

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grant the defendant a new trial because of the admission of certain evidence offered by the plaintiff over the objection of the defendant, and his refusal to give in charge to the jury certain written instructions submitted by counsel for the railway company at the conclusion of the charge in chief.

For the defendant in error it is insisted that these assignments of error cannot be considered by this court because the errors complained of were not properly set out and relied upon as grounds for a new trial in the motion made by the plaintiff in error in the trial court for that purpose, as required by a rule of that court, and passed upon by the presiding judge.

The rule of the circuit court of Shelby county in relation to motions for new trials, which is in the record, requires all grounds upon which a new trial is asked to be stated and set out separately in a written motion and entered upon the minutes of the court; and all errors not so set out are presumed to be waived, and will not be considered on the hearing of the motion.

The plaintiff in error attempted to comply with this rule, and the grounds for a new trial upon which these assignments are based are stated in its motion in these words:

“(1) For error in the admission and exclusion of evidence.

“(2) The court erred in refusing the special instructions asked by the defendant.”

The jurisdiction of this court is exclusively appellate,

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and it can only pass upon matters which the record shows have been considered and adjudged by the trial court from which the case has been appealed. The errors reviewed and corrected by it are of two classes: Those which appear upon the face of the record proper, as erroneous rulings in sustaining or overruling motions, and demurrers challenging the sufficiency of pleadings; and errors committed in allowing or overruling motions for new trials upon grounds brought into the record by bills of exceptions, as for improperly refusing a continuance, the admission of incompetent evidence, or the rejection of competent evidence, error in instructing the jury, or refusing further instructions seasonably requested in proper form, for want of evidence to sustain the verdict, or other similar ground. It does not act directly upon errors of the latter class, which are not a part of the record without a bill of exceptions, but upon the action of the trial judge for refusing a new trial because of such errors committed by him, or otherwise occurring in the progress of the case, as they may be waived or corrected before verdict. Therefore, before the jurisdiction of this court can be invoked and relief had on account of errors of the second class, they must be considered and acted upon by the trial judge in the disposition of a motion made by the losing party to set aside the verdict of the jury and allow him a new trial. Another reason why all errors which may affect the integrity of the verdict should be brought to the attention of the trial judge in a motion for a new trial is that he

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may have an opportunity to correct them, if necessary, by granting a new trial, and thus save the inconvenience, delay, and expense attending appellate proceedings.

The reason why this court will consider errors which appear upon the face of the record proper, without a motion for a new trial, is that they do not directly affect the correctness of the verdict, and would not be cured by setting it aside.

That a motion for a new trial, made and overruled, is necessary, in order to give the appellant the advantage of errors occurring in the trial of the case, which a bill of exceptions is required to bring into the record, is well settled. An eminent author on Practice says: "A motion for a new trial is an application made in a trial court for a retrial of the issue or issues of fact. It is a direct, and not a collateral, motion, and ordinarily its office is to specifically direct the attention of the court to errors committed during the trial, and to get the questions into the record and have them corrected by a new trial, or to thus correct a verdict or finding which is contrary to law or the evidence. It is necessary, as a general rule, in order to present upon appeal questions as to errors of law occurring at the trial which cannot be independently assigned in an appellate court, and generally to present any matter that does not appear in the record proper." Elliott on General Practice, vol. 2, section 987.

And in another valuable work on Practice it is said:

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"The office of a motion for a new trial is twofold: First, to present the errors complained of to the trial court for review and correction, or to secure a new trial; second, to preserve the same errors in the record, so that the ruling of the trial court in granting or refusing a new trial may be reviewed by the appellate court. It is a general rule that all errors correctable by motion for a new trial, and not so assigned, are deemed to have been waived by the applicants for a new trial. Unless a motion for a new trial has been presented and considered by the lower court, and its ruling preserved, the errors assigned in the motion will not be reviewed by the appellate court. To secure a review in the appellate court of errors committed at the trial, the complaining party must except to the errors and irregularities at the time when the rulings of the court thereon are made, and must call the attention of the trial court to such rulings by assigning them as errors and as grounds for a new trial; otherwise such errors will be deemed waived. It is a well known rule of appellate courts that errors of the trial court occurring during the trial will not be reviewed unless such errors have been called to the attention of the trial court, and opportunity given to correct them. It is necessary, therefore, to present such error to the trial court by a motion for a new trial, and to secure a ruling on the motion." Ency. of Plead. & Prac., vol. 14, p. 846.

Whether a motion for a new trial specifically stating the grounds upon which it is asked is necessary in cases tried by the presiding judge without the intervention of

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a jury is reserved in *Lancaster v. Fisher*, 94 Tenn., 228, 28 S. W., 1094, but we would be inclined to hold that the better practice would require that it be done.

The motion must be reduced to writing and spread upon the minutes of the court, where the action of the court thereon must also appear. It is not sufficient that it, or the action of the court thereon, appears in the bill of exceptions. *Railroad v. Egerton*, 98 Tenn., 541, 41 S. W., 1035.

The circuit and law courts of this State have authority, by rules of practice applicable to such courts, to control the form and time in which motions for new trials shall be made and disposed of, which are reasonable and not inconsistent with the law. Code 1858, section 4237 Shannon's Ed., section 6075); *Mallon v. Manufacturing Co.*, 75 Tenn., 62; *Alexander v. State*, 82 Tenn., 91; *Patterson v. Patterson*, 89 Tenn., 154, 14 S. W., 485; *Railway Company v. Hendricks*, 88 Tenn., 719, 13 S. W., 696, 14 S. W., 488.

And this court, in the exercise of its power to prescribe rules of practice, may provide that errors assigned upon the action of the trial judge in refusing new trials, in cases brought to it from the circuit or law courts, shall be predicated only upon such grounds for new trial as were set out in the motion made for that purpose in the trial court, regardless of the rules of that court. Code 1858, section 4504 (Shannon's Ed., section 6337); *Denton v. Woods*, 86 Tenn., 37, 5 S. W., 489; *Wood v.*

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Frazier, 86 Tenn., 500, 8 S. W., 148; *Riggs v. White*, 51 Tenn., 504; *Foster v. Burem*, 48 Tenn., 784.

Rules similar to that under consideration requiring all grounds for new trials, whether of law or fact, to be stated separately in writing, and entered upon the minutes of the court, and providing that all errors not so set out shall be considered as waived, are now in force in a majority of the circuits of this State, and are not only reasonable and valid, but the experience of these courts, and of this in the cases coming from them, has demonstrated that they contribute greatly to the speedy, final, and correct disposition of litigation; and it would be better, for these reasons, and to prevent mistakes resulting from the existence of different rules of practice in the courts of the State, that they be adopted in all of them.

This court has repeatedly held, in cases brought to it from circuits having this rule, that all errors of the trial court not assigned as grounds for new trial in the motion made for that purpose are thereby waived, and that assignments of error upon the refusal of the trial judge to grant new trials cannot be predicated upon grounds not so assigned in the lower court. *Railroad v. Blair*, 104 Tenn., 212, 55 S. W., 154; *Wise & Co v. Morgan*, 101 Tenn., 273, 48 S. W., 971, 44 L. R. A., 548.

We are now to determine whether or not the grounds upon which these assignments of error are predicated are sufficiently set out in the motion for a new trial. It

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seems to be well settled that the statement of the grounds in the motion must be sufficient to direct the attention of the court and opposing counsel to the error or irregularity relied upon to vitiate the verdict.

In the work on Pleading & Practice last quoted from, it is further said: "The general rule is that the grounds [for a new trial] must be stated so specifically as to direct the attention of the court and opposing counsel to the precise error complained of. A mere statement of the grounds, without further specifications, will therefore be insufficient. The purpose of the rule is to direct the attention of the trial judge to the alleged erroneous rulings, and present to the appellate court the precise question involved. The safest course is to assign each error with the same particularity of an assignment of error in appeal. . . . But this is not the practice in most of the States; the courts holding that it is sufficient merely to assign error in the ruling complained of, as that the court erred in giving a certain construction or admitting certain evidence, without stating why such ruling was erroneous. If the grounds for a new trial are not stated in the motion, it may be overruled by the court, and disregarded on appeal. All errors known at the time of filing the motion must be included therein, or the errors omitted will be deemed to have been waived." *Ency. of Plead. & Prac.*, vol. 14, pp. 882, 883.

Mr. Elliott, in his work above cited (volume 2, section 991), says: "The law presumes the verdict to be correct. Hence on a motion for a new trial the party must set

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forth the grounds upon which he intends to rely, or the objections will be considered as waived. The motion should be in writing, and should specify with reasonable certainty all the rulings deemed to be erroneous. It is to be kept in mind that it is the objections specified in a motion, and those only, that are brought up for review, for all others properly arising on a motion for a new trial are deemed to be waived. It is on a motion—as it is written—that the appellate court acts, for, as to objections not properly presented, the presumption is in favor of the regularity and legality of the rulings of the trial court. It is the business of the party who takes exceptions to show that the decision is wrong. It is not sufficient that he succeeds in mystifying it by adopting language which subjects the judge to the suspicion that he did not understand the safest ground on which to place it. In order to show that rulings are wrong it must appear that they were probably injurious to the party who makes complaint, since a mere harmless error will not warrant a reversal.”

The text in both of these works, which are of the highest authority, is supported by numerous decisions of other States, many of which are predicated upon the general rules of practice of courts of law.

We are of the opinion that the grounds set out in the motion should be as specific and certain as the nature of the error complained of will permit. Thus, if the error consists in the admission or rejection of evidence, the evidence admitted or rejected should be stated. If it be

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for affirmative error in the charge, or for failure to give an instruction properly and reasonably presented, it should set out the portion of the charge complained of, or the instruction refused, or otherwise definitely identify the instruction. If it be for misconduct of the opposite party or that of the jury, the facts constituting it should be stated. This was not done in this case. The testimony admitted and that excluded is not stated—not even the name of the witness given—and the instructions requested are not set out or sufficiently identified.

We do not think that it is necessary to state why the ruling complained of is erroneous as fully and with all the strictness required in assignments of error in this court, but a fair statement of the error complained of, sufficient to direct the attention of the court and the prevailing party to it, is all that is required.

Nor was it necessary for the successful party in the court below to there object to the form of the motion, because rules of this character are made in the interest of the public, and for the purpose of enabling the courts to speedily and correctly dispose of the cases pending in them, and they cannot be waived by litigants.

We are of the opinion that no sufficient grounds for a new trial because of the admission of incompetent or rejection of competent testimony, or a failure to give in charge to the jury instructions submitted by the defendant, were stated in the motion made by it in the circuit court, and that there is therefore nothing upon which these assignments of error on the action of the trial

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judge in refusing to set aside the verdict and grant a new trial can be predicated; and, under the practice of this court, in cases coming from those courts having rules like that in this record, not to consider the assignments of error upon any ground not appearing in the motion for a new trial, these assignments of error are insufficient, and must be overruled.

The other assignments of error filed by the plaintiff in error were disposed of in an oral opinion.

Fite v. State, ex rel.

J. S. FITE, Superintendent of County Workhouse, *v.*
STATE, *ex rel.* NICK SNIDER.

(*Jackson*. April Term, 1905.)

1. **CONSTITUTIONAL LAW.** Statute specifically defining credits for good conduct of convicts, in existence at date of conviction, is not an invasion of the pardoning power.

Legislation, authorizing the commutation of penal sentences for good conduct of convicts confined in prison, where the credits are specifically defined by statute, and where the provisions of the statute operate alone upon sentences of convicts who have been imprisoned subsequent to the passage of the statute, is not an invasion of the constitutional prerogative of the governor in granting pardons, because such statute, in existence at the date of the judgment against the convict, becomes a part of the sentence and inheres into the punishment assessed. (*Post*, pp. 655-658.)

Code cited and construed: Sec. 7423 (S).

Acts cited and construed: 1869-70, ch. 59, sec. 7; 1885 (*ex. ses.*), ch. 15; 1891, ch. 123, sec. 18.

Constitution cited and construed: Art. 3, sec. 6.

Cases cited and approved: *State, ex rel., v. McClellan*, 87 Tenn., 52-55; *Rogers v. State*, 101 Tenn., 425; *State v. Dalton*, 109 Tenn., 544; *Opinion of Justices*, 13 Gray (Mass.), 618; *State v. Austin*, 113 Mo., 538; *Woodward v. Murdock*, 124 Ind., 439; *In re Fuller*, 34 Neb., 581; *Ex parte Nokes*, 6 Utah, 106; *State v. Patterson* (N. J. Sup.), 22 Atl., 802; *United States v. Wilson*, 7 Pet., 150; *Osborn v. United States*, 91 U. S., 474, 478; *Ex parte Garland*, 4 Wall., 380; *Ex parte Wadleigh*, 82 Cal., 518; *In re Canfield*, 98 Mich., 644.

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2. **SAME.** Statute authorizing commutation of sentences in discretion of a board, without prescribing the schedule of specific credits for good conduct, is an unconstitutional delegation of legislative authority.

A statute authorizing the board of commissioners of the county workhouse to deduct for good conduct, and on recommendation of the superintendent, a portion of the time for which any person has been sentenced, or a portion of the fine which he is working out, but failing to prescribe any schedule of specific credits to be allowed for good conduct, and leaving the whole matter to the arbitrary discretion of the board of workhouse commissioners, is plainly a delegation of legislative authority, and is unconstitutional. (*Post*, pp. 648-655, 658-660.)

Code cited and construed: Sec. 7423 (S.).

Acts cited and construed: 1891, ch. 123, sec. 18.

Constitution cited and construed: Art. 1, sec. 6.

Cases cited and approved: *State, ex rel., v. McClellan*, 87 Tenn., 52-55; *State v. Dalton*, 109 Tenn., 544; *People v. Cummings*, 88 Mich., 249; *Commonwealth v. Halloway*, 44 Pa., 210; *State, ex rel., v. Board*, 16 Utah, 478-488.

Case cited and disapproved: *State, ex rel., v. Peters*, 43 Ohio St., 629.

- 3 **SAME.** Statute unconstitutional and void in part may be valid in other parts, when.

An unconstitutional and void provision of a legislative act may be so independent of the other provisions of the act as not to affect their constitutionality. (*Post*, p. 659.)

Code cited and construed: Sec. 7423 (S.).

Acts cited and construed: 1891, ch. 123, sec. 18.

Case cited and approved: *State, ex rel., v. Cummins*, 99 Tenn., 682.

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FROM SHELBY.

Appeal from the Second Circuit Court of Shelby County.—J. S. GALLOWAY, Judge.

ATTORNEY-GENERAL CATES, for appellant.

L. T. M. CANADA, for appellee.

MR. JUSTICE M'ALISTER delivered the opinion of the Court.

The question involved in this case is in respect to the constitutionality of a certain provision of the workhouse law embodied in Shannon's Code, section 7423, namely: "The board of commissioners may on recommendation of the superintendent, deduct, for good conduct, a portion of the time for which any person has been sentenced, or a portion of the fine, if he or she be working out a fine."

The subject-matter of the inquiry arises on the petition of one Nick Snider, prisoner in the county workhouse of Shelby county, for the writ of habeas corpus to be discharged from said confinement upon the ground that a proper credit and allowance for good time under said act would entitle him to his liberty. The record

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reveals that the prisoner was under confinement in said workhouse under the judgment of the criminal court of Shelby county, on the 17th day of November, 1903, upon a conviction of unlawfully carrying a pistol, and the assessment of a fine of \$50 and confinement in said workhouse for a period of eleven months and twenty-nine days. On the 14th of March, 1904, in accordance with the recommendation of the superintendent of said workhouse, the board of workhouse commissioners directed that the relator, Snider, be relieved of eight months of his term of imprisonment on account of his good conduct.

It further appears that on March 28, 1904, said board of workhouse commissioners directed that the sum of \$45 of the fine of \$50 imposed upon the relator by judgment of the criminal court be remitted. Thereafter, on the 1st of April, 1904, said board of workhouse commissioners, in view of the credits allowed on fine and sentence of said Nick Snider, relator, ordered his discharge from the county workhouse upon payment of all costs, which was accordingly done.

It appears, however, that the judge presiding over the criminal court of Shelby county, conceiving that the action taken by the board of workhouse commissioners was beyond their authority, issued an order directing the superintendent of the workhouse to hold relator in custody until he had served out his term of imprisonment and paid the fine imposed, or had secured or worked out said fine in the manner directed by law. Thereupon the

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relator filed his petition for the writ of habeas corpus, which being heard by the judge of the second circuit court of Shelby county, it was adjudged that the relator was illegally restrained of his liberty, and he was ordered to be discharged, and the defendant, Fite, as superintendent of the Shelby county workhouse, was taxed with all costs of proceeding.

The said Fite, superintendent aforesaid, appealed, and has assigned the following error: "The orders of the board of workhouse commissioners of Shelby county relieving relator of \$45 of the fine of \$50 imposed upon him, and reducing jail sentence from eleven months and twenty-nine days to three months and twenty-nine days, were beyond the authority vested in said board of workhouse commissioners, and were null and void, because:

"(1) The statute under which said board claimed authority to make said orders is unconstitutional, in that it attempts to confer the pardoning power upon said board, in violation of section 6 of article 3 of the constitution of the State; and,

"(2) It is also violative of section 1 of article 6 of the constitution of the State in that it attempts to confer upon said board judicial power to review, revise, and modify valid judgments of criminal and circuit courts of this State."

The provisions of the workhouse law material to be mentioned in this investigation are embodied in section 18, c. 123, p. 271, of the act of 1891, compiled in Shannon's Code in section 7423, namely: "The board of com-

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missioners may on recommendation of the superintendent deduct, for good conduct, a portion of the time for which any person has been sentenced, or a portion of the fine, if he or she be working out a fine. Should any prisoner escape, he or she shall forfeit all deductions that have been allowed and when recaptured, should be made to work out the costs of same in addition to other costs in the case. The commissioners may discharge any prisoner when satisfied from the certificate of physician in charge that he or she is physically unable to do labor or for any cause when they may deem it best for the institution and the public good."

The argument of the attorney-general is that the exercise of the power conferred upon said board of workhouse commissioners is both violative of section 6 of article 3 of the constitution of the State, vesting in the governor the pardoning power, and is also in contravention of section 1, article 6, of the constitution, vesting all judicial power in the courts of this State, because the necessary effect of the exercise of said power by the board of workhouse commissioners is to constitute said board a judicial tribunal for the purpose of reviewing, modifying, and reversing the judgment of courts of competent jurisdiction acting under the power vested in them by the constitution of the State.

We have several cases in this State in which intimations were thrown out touching the constitutionality of such acts, but no case in which the precise point now presented was involved. In *State v. Dalton*, 109 Tenn.,

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544, 72 S. W., 456, the court was dealing with the power of the circuit judge to relieve a convict of imprisonment imposed by a valid judgment rendered at a former term. In its opinion this court said: "The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the State, and the legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved. The circuit judge's action in remitting the imprisonment and releasing the costs adjudged against the defendant cannot be sustained under section 7226 of Shannon's Edition of the Code or Act 1891, p. 271, c. 123, section 18 (Shannon's Code, section 7423), authorizing the discharge of convicts confined in workhouses under certain circumstances."

In *The State, ex rel., v. McClellan*, 87 Tenn., 52-55, 9 S. W., 233, the act of 1885 (Acts 1885, p. 87, c. 15) allowing to convicts certain specific credits on their terms of imprisonment in consideration of good conduct was involved, but it appeared in that case that the judgment under which the prisoner was serving had been rendered prior to the passage of the act of 1885, and for that reason the court expressed no opinion touching its constitutionality. In that case, however, the court said as follows:

"The act of 1885 (passed at the extra session June

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12) . . . is also referred to, and it is insisted that the relator was and is entitled to the benefit of that act; but such cannot be its effect, though it purports to be for the benefit of those then as well as thereafter confined in the penitentiary, because to the extent of provision for those then confined it is an attempted exercise of the pardoning power, which is vested alone in the governor under the constitution, and is void."

Again, in the case of *Rogers v. State*, 101 Tenn., 425, 47 S. W., 697, the question as to the constitutionality of this section of the workhouse law was raised, but not decided, as the case went off on another point.

There seems to be much authority on this subject in other States of the union, which we find upon examination is not altogether harmonious.

The supreme court of Michigan in *People v. Daniel Cummings*, 88 Mich., 249, 50 N. W., 310, 14 L. R. A., 285, in passing upon the constitutionality of a statute of that State providing for indeterminate sentences and the disposition, management, and release of criminals under such sentences, says as follows: "It is not clear from the reading of this statute whether the board of control is given power of absolute discharge from imprisonment or not, if so it would be clearly unconstitutional, as an exercise of such power would certainly involve one of two things, and perhaps both. It would be an exercise of judicial power in determining the term of imprisonment of a citizen or an act of grace, to wit, the bestowing of a pardon and release of the pris-

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oner before his term of imprisonment has expired. The judicial power of this State by the constitution is vested in certain specified courts, and the pardoning power is vested absolutely in the governor of the State." The court then proceeded to hold that this act provided for the exercise of the pardoning power and also for the exercise of judicial power by said board of control.

In *Commonwealth v. Holloway*, 44 Pa., 210, 84 Am. Dec., 431, it was held that such legislation was not an interference with the pardoning power, for the reason that "pardon operates directly on the crime, and only indirectly on the criminal." But it was further held by a divided court that such diminution of sentence by reason of good conduct was an interference with judicial power, and therefore void. In the midst of its opinion the court said as follows: "From what judicial sentence may not the legislature direct deductions to be made, if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?" Further on the court says: "In respect to one of the relators, who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment. But is it not equally so in respect to him who was sentenced since the date of the act. The court could not have taken the act into account in measuring the sentence because they

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could not know how many days of abatement the prisoner would earn.

In *State, ex rel. Attorney-General, v. Peters*, 43 Ohio St., 629, 4 N. E., 81, the supreme court of that State dealing with a kindred statute, held:

"It was not an interference with executive or judicial powers conferred on these departments by the constitution of the State."

In *State, ex rel., v. State Board of Correction et al.*, 16 Utah, 478-488, 52 Pac., 1090, a similar question arose, and the supreme court of that State held the act unconstitutional, as being in violation of the governor's constitutional prerogative of pardon. That court said: "The power to either pardon or commute can only be exercised by that authority in which it is vested by the constitution." On the other hand, such statutes allowing good time as credit on sentences have been upheld. *Opinion of Justices*, 13 Gray (Mass.), 618; *State v. Austin*, 113 Mo., 538, 21 S. W., 31, *Woodward v. Murdock*, 124 Ind., 439, 24 N. E., 1047; *In re Fuller*, 34 Neb., 581, 52 N. W., 577; *Ex parte Nokes*, 6 Utah, 106, 21 Pac., 458; *State v. Patterson* (N. J. Sup), 22 Atl., 802.

The congress of the United States, it appears, has also provided for credits on sentences of federal convicts confined in state penitentiaries where there is no statute of the particular state providing for such allowances. Rev. St., sections 5543, 5544 [U. S. Comp. St. 1901, p. 3721].

We are of opinion, upon an examination of the authorities and upon principle, that such legislation,

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where the credits are specifically defined by statute, and where the provisions of the statute operate alone upon sentences of convicts who have been imprisoned subsequent to the passage of the statute, is not an invasion of the constitutional prerogative of the governor. Said Chief Justice Marshall in *United States v. Wilson*, 7 Pet., 150, 8 L. Ed., 640: "A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from punishment the law inflicts for a crime he has committed. . . . It releases the offense and obliterates it in legal contemplation." Per Justice Field in *Osborn v. United States*, 91 U. S., 474, 478, 23 L. Ed., 388. A full and absolute pardon releases the offender from entire punishment prescribed for his offense, and from all the disabilities consequent upon his conviction. *Ex parte Garland*, 4 Wall., 380, 18 L. Ed., 366.

Again: "A pardon discharges the individual designated from all or some specified penal consequences of his crime. It may be full or partial, absolute or conditional." Bouvier's Law Dictionary, title "Pardon."

We think it quite obvious that an act of the legislature specifically defining credits for the good conduct, in existence at the date of the judgment against the convict, becomes a part of the sentence, and inheres into the punishment assessed. In California a statute providing in express terms that certain credits or deductions from a term of imprisonment shall be allowed for good con-

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duct, without requiring any action on the part of the governor for this purpose, was held not to be unconstitutional as an infringement on his power to pardon, as it does not take away or interfere with such power in any way. In the opinion of the court the statute simply fixed the term of imprisonment in certain cases and upon certain conditions, and this provision entered into and became a part of the judgment of the court below.

Ex parte Wadleigh, 82 Cal., 518, 23 Pac., 190.

In re Canfield, 98 Mich., 644, 57 N. W., 807, it was held that the right of a convict to a prescribed reduction from his sentence upon compliance with the rules of the prison, which were prescribed by 2 How. Ann. St. Mich. section 9704, was one of which he could not be deprived, and that the act of 1893, the effect of which was to deprive a person sentenced under the prior statute of this right in part by reducing the amount of his credits, is to that extent an *ex post facto* law, because its effect is to increase, and not to mitigate, his punishment. It was held, therefore, that the prisoner was entitled to credit upon the basis of the statute under which he was sentenced.

Such, however, would not be the effect of an act of the legislature passed subsequent to the conviction of a particular convict, for, as held in *State, ex rel., v. McClellan*, supra, that would be a clear invasion of the prerogative of the governor. The scale of the punishment for the violation of a particular statute is fixed in the

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first place by the legislature, and in the next it is administered by the court or jury. The power of the governor under the constitution is exercised of course, with reference to penalties and punishments inflicted by particular statutes, and when judgment is pronounced upon the convict assessing his punishment by implication of law he is entitled to the provisions of a statute prescribing credits for his good behavior; but the credits are in the nature of a payment by the State to the convict for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes and misdemeanors during his imprisonment. Such statutes are prompted by the highest motives of humanity, and are looked upon with favor both by State and federal legislatures.

The constitutional infirmity of section 18 of the workhouse law of 1891, now under review, is that no specific credits are provided as a reward for good behavior of the convict. The whole matter is left to the arbitrary discretion of the board of workhouse commissioners. It is plainly a delegation of legislative authority, which renders this part of the workhouse law unconstitutional and void. In this respect section 18 of the workhouse law is wholly unlike the acts of 1869-70 and 1885, which specifically prescribed the credits that are to be allowed, and which statutes have been enforced from time to time by the courts.

As already seen in *State v. McClellan*, *supra*, the act of 1869-70 was recognized by the court as a constitution-

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al enactment, and it was accordingly applied in fixing the unexpired term of imprisonment of relator in that case. It may be remarked in this connection that the acts of congress in allowing credit for good time specifically prescribed the scale by which they are to be graduated. But while section 18 of the workhouse law is for this reason unconstitutional and void, it is so independent of the other provisions of the act as not thereby to affect their constitutionality. See *State, ex rel., v. Cummins*, 99 Tenn., 682, 42 S. W., 880. If the legislature had fixed a scale of credits for allowances of good time to workhouse prisoners, this section of the act would stand within constitutional limitations; but without it it is clearly void as a delegation of legislative authority. So, if the legislature had fixed some graduated scale for the reduction of fines assessed against the prisoners, then the board of workhouse commissioners might have carried out the legislative authority. But, as already seen, section 18 of the workhouse act authorizes the commissioners to remit a portion of the fine without fixing any basis for its remission.

As the law now stands, the remission of fines and reduction of terms of imprisonment of convicts confined in the county workhouses of the state are wholly without authority, and subject such officials granting them to individual liability for malfeasance in office. It is the duty of the courts and executive officers of the state to disregard, as well as to resist with all their official authority, the exercise of unlawful functions and assumed

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power of those who are acting in open violation of the statutes and constitution of the state. It is very plain that under the existing laws, and until their amendment by the legislature, the governor alone is clothed with authority to remit fines and penalties and to reduce the terms of imprisonment of convicts confined in the county workhouse under judgments of the circuit and criminal courts of the State.

The judgment of the circuit court will therefore be reversed, the cause remanded, and the prisoner committed to the sheriff of the county, to be returned to the official in charge of the county workhouse, to serve out his fine and imprisonment assessed by the criminal court of Shelby county.

McCaul v. Telegraph Co.

JENNIE M'CAUL, by next friend, v. WESTERN UNION TELEGRAPH COMPANY.

(*Jackson*. April Term, 1905.)

TELEGRAPH COMPANIES. Not required to deliver messages at residence of addressees beyond place of destination, and in the country, when.

Telegraph companies are under no legal obligations to deliver a telegram to addressees at their residence beyond the place of destination of the message, and three and one-half miles in the country therefrom, where the message is taken by the receiving operator without notice that the addressees so resided, three and one-half miles in the country from such destination, and where charges were neither paid nor guaranteed for delivering the message at such residence of the addressees.

FROM GIBSON.

Appeal from the Circuit Court of Gibson County.—
LEVI S. WOODS, Judge.

W. W. POWERS and HARWOOD & WADE, for McCaul.

DEASON, RANKIN & ELDER and SHIELDS, CATES & MOUNTCASTLE, for Telegraph Co.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The plaintiff in error, a married woman, living in Gibson county, Tenn., was notified by telegram from Sikeston, Mo., where her young son was visiting, that he had been accidentally wounded. On the receipt of this intelligence she left for that place, reaching the bedside of her son on the 17th of November, 1903. The day after her arrival, he died. Desiring to take his body back to her home for interment, but lacking the means to do so, after his death she prepared and caused to be delivered to the operator of the Western Union Telegraph Company at Sikeston, for transmission to Trenton, Tenn., the following message:

"11-18-1903. Dated—Sikeston, Missouri—18, To Mrs. M. C. McCaul, care of Hugh McCaul, Trenton, Tennessee. Have bank wire bank of Sikeston \$50.00, my son Hugh dead here. [Signed] Jennie McCaul."

On delivering this telegram to the operator at Sikeston, there was paid to him the regular tariff rate of twenty-five cents for its transmission to Trenton, to which place it was at once started over the wires of the defendant company, reaching there about 7:10 o'clock of the evening of the 18th. When received, as there was no messenger service from 7 p. m. to 7. a. m., the telegram was put on file, by the operator receiving it, to be sent out the following morning.

At the hour of 7 a. m. of the 19th, a messenger came to the office, and he was at once given the message, with di-

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rection that he take it out for delivery to the sendees, if they, or either of them, could be found in the town of Trenton. Not finding either of the parties, it was returned to the office, and in the afternoon was sent by special hand to the home of the sendees, which was three and one half miles in the country, and was delivered there at 4 p. m.

Mrs. McCaul, the sender of this message, knew the sendees lived at that distance from Trenton, but she failed to communicate the fact to the operator at Sikeston, and also failed either to pay, or guarantee payment, for the extra service required in its delivery to the home of the sendees.

The record shows that while this telegram was thus delivered after the banking hours observed in Trenton, yet, if application had been made to the officers of the bank, with which Mrs. McCaul did business, either by herself or Mr. Hugh McCaul, during the evening of the 19th, that they would have immediately wired the sum asked for to the bank in Sikeston. No application, however, was made to these officers until the following day, when the money was at once transmitted, reaching Sikeston, however, too late to answer the purpose of the sender of the message. It was then found the body of young McCaul was so far advanced in decay that it would be dangerous to undertake to carry it to Gibson county, so it was buried at or near Sikeston.

Upon these facts the trial judge said to the jury, in substance, that the obligation of the defendant in error

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was to transmit and attempt to deliver without unreasonable delay, this message to the sendees, or one of them, at Trenton; that there was no obligation resting on the company to send it out to the home of the sendees, three and one-half miles in the country; and, if they found that diligence was used in an effort to deliver at Trenton, then they should find for the defendant.

We think this instruction was correct. The money which was paid by the sender at Sikeston was for the service of transmission and delivery at Trenton. If it should be held, in the absence of all knowledge on the part of the operator at Sikeston that the sendees lived three and one-half miles from the place to which it was directed, the company was to be held liable for lack of prompt delivery at the residence of the sendees, then it might be so equally held, if it had happened that these sendees resided ten miles, or even a greater distance from there. Such a holding would impose an unreasonable burden on the company, especially in view of the fact that the telegram, on its face, as we think, implied that the sendees, one or both, were to be found in Trenton.

It is an easy matter for the sender to provide for the delivery of his telegram, whatever may be the distance of the sendee from the point to which it is directed. All that he has to do is to notify the receiving operator, when delivering the telegram for transmission, that the sendee lives at a place other than the one to which it is directed. If received for transmission uncondition-

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ally by one authorized so to do after such notice, the law will imply an obligation upon the part of the company to deliver the message at the place of the sendee's residence, or if, at the time of such receipt, payment is made or guaranteed for such delivery, in either case a failure to deliver within a reasonable time would be a breach of duty on the part of the company, for which it would be liable. But when it appears, as in this case, that the receiving operator had no such notice, and charges were neither paid nor guaranteed for delivering the message at the residence of the sendees, living, as they did, at a point remote from Trenton, the company was under no legal obligation to deliver it at that point. *Western Union Co. v. Harvey* (Kan.), 74 Pac., 250; *Western Union Tel. Co. v. Swearingen* (Tex. Sup.), 67 S. W., 767.

We think the charge of the trial judge correctly stated the rule of law controlling in this case, and without more his judgment is affirmed.

Sparks v. Sparks.

JOHN N. SPARKS *v.* FANNY P. SPARKS.

(*Jackson*. April Term, 1905.)

DIVORCE. Residence required for maintaining a bill for divorce is lost by residence at Washington City, with intention of returning only upon loss of governmental position of indefinite tenure.

Where a petitioner for divorce was born in Tennessee and resided here until he was appointed to a position in a governmental department at Washington, D. C., when he carried his family to that city, where he kept house for twenty-two years, only returning to this State on three occasions during all that time, when he voted here, for which purpose a paid his poll tax, with the intention of returning in the event that he should lose his position (which was under the civil service law, but the tenure of it was such that he might be discharged at any time), without any fixed purpose of returning in any event, he has lost his citizenship, residence and domicile in Tennessee, and he is not entitled to maintain a bill for divorce.

Code cited and construed: Sec. 4203 (S.); sec. 3308 (M. & V.); sec. 2450 (T. & S. and 1858).

Cases cited and approved: *Fickle v. Fickle*, 5 Yer., 203; *Foster v. Hall*, 4 Hum., 348; *Allen v. Thomason*, 11 Hum., 536; *Layne v. Pardee*, 2 Swan, 235; *Pearce v. State*, 1 Sneed, 66; *Straton v. Brigham*, 2 Sneed, 423; *White v. White*, 3 Head, 410; *Williams v. Saunders*, 5 Cold., 79; *Kellar v. Baird*, 5 Heis., 46-49.

FROM CARROLL.

Appeal from the Chancery Court of Carroll County.
—A. G. HAWKINS, Chancellor.

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GEORGE T. M'CALL, for appellant.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is a bill brought by the complainant, seeking a divorce from his wife, the defendant; the grounds charged being adultery and malicious desertion without reasonable cause for two whole years, committed in the District of Columbia. These charges are fully sustained by the proof, but the chancellor dismissed the bill for want of jurisdiction, being of the opinion that the complainant had not resided in this State for two years next preceding the filing of the bill, and therefore, under Code 1858, section 2450 (Shannon's Code, section 4203), was not entitled to maintain a bill for divorce in the courts of Tennessee.

The complainant charged in this bill and testified upon the hearing that he was born in Carroll county, Tennessee, and was raised in, and has been all the while and is now a citizen of, that county; that he resided there until 1882, when he was appointed to a position in the treasury department of the United States, at Washington, District of Columbia, when he carried his family to that city, and has lived there ever since, holding his said position; that he has within said period returned to Carroll county on three several occasions, on leave of absence of thirty days each, and has voted there in several elections, paying his poll tax in order to en-

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able him to do so, and has had and yet has his church membership there, but he has not voted in all elections nor paid a poll tax for every year he was liable for such tax. He further testifies that it has always been his intention to return to Carroll county to reside in the event he should lose his position in the treasury department, which is under the civil service law, but the tenure of it is such that he may be discharged.

Citizenship, within the meaning of the section of the Code in question, includes residence; and, if complainant is yet a citizen of Tennessee, he may maintain this bill. *Fickle v. Fickle*, 5 Yerg., 203.

The question then is, has the complainant under the facts stated, lost citizenship and domicile in Tennessee? There is no question but what the complainant was previous to the time he went to Washington City, a citizen of Carroll county, Tennessee. There he was born and raised. There was the domicile of his nativity. Every one is presumed to retain this domicile until another is acquired. *Layne v. Pardee*, 2 Swan, 235.

And in order to constitute a change of domicile there must be concurrence of actual change of residence, and intention to abandon the old and acquire a new domicile. *Foster v. Hall & Eaton*, 4 Humph., 348; *Allen v. Thomson*, 11 Humph., 536, 54 Am. Dec., 55; *White v. White*, 3 Head, 410; *Williams v. Saunders*, 5 Cold., 79.

Where one has his residence and carries on his business is usually his domicile, but not necessarily so. He may be there temporarily, for the purpose of the partic-

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ular business in hand, with an absolute and definite intention of returning to his original and actual domicile. *Pearce v. State*, 1 Sneed, 66, 60 Am. Dec., 135.

If the absence from the domicile of nativity or an acquired domicile is temporary, and there is all the while a fixed and definite intention of returning, there is no change, and no new domicile is obtained. Residence, however long, will not work a change of domicile, unless accompanied with such intent. *Kellar v. Baird*, 5 Heisk., 46; *Layne v. Pardee*, 2 Swan, 235.

The intention, however, to return to the domicile of nativity, or one acquired, must be fixed, absolute, and unconditional. A mere floating intention to return at some future period or upon the happening of some uncertain event is not sufficient. The intent to return must not depend upon inclination or be controlled by future events. *Stratton v. Brigham*, 2 Sneed, 423; *Kellar v. Baird*, 5 Heisk., 46-49; Story on Conflict of Laws, section 46.

In determining whether or not a change of domicile has been made, it is proper to consider, along with the statement of the party of his intent in the matter, his conduct and declarations, and all other facts that throw light upon the subject. Complainant, when he brought this bill, had been a resident in Washington City for twenty-two years, had kept house and reared his family there, and had only returned to his former home and exercised the rights of a citizen there on three occasions during all that time, and does not now state that he has

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any fixed purpose to again take up his residence and the duties and rights of a citizen in this State. His strongest statement is that he is subject to dismissal in his employment in the treasury department, and in the event of such dismissal it is his intention to return. The clear inference is that if he should not be dismissed he will continue his residence in Washington during the remainder of his days. His return is conditioned upon an event that may never happen. He has no fixed purpose to return in any event. Upon these facts, we are clearly of the opinion that he has lost his citizenship and domicile in Tennessee, and is not entitled to maintain this suit. We are not to be understood as holding that a citizen of Tennessee, who removes himself and family out of the State for the purpose of discharging the duties of an office to which he has been elected or appointed, or for any other purpose, either for a definite or an indefinite time, with a distinct and fixed purpose of returning to his home in this State, and who, by discharging the duties of a citizen and taxpayer of the State and exercising the privileges of a citizen, manifests his intention to retain his citizenship and domicile here, loses his citizenship. On the contrary, upon the facts stated, it is clear that he would not, upon the well-settled principle that a mere transient or temporary absence from the State, with a fixed purpose of returning, does not work a change of domicile.

There is no error in the decree of the chancellor dismissing this bill, and it will be affirmed, with costs.

Railroad v. Flake.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY v. JAMES FLAKE, by next friend.*

(*Jackson*. April Term, 1905.)

1. **COMMON CARRIERS.** Vigilance required in protection of passengers from injury by other passengers, and liability for failure to perform such duty.

Common carriers of passengers are bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might be reasonably anticipated or naturally be expected to occur, in view of all the circumstances, and of the number and character of persons on board; and whenever a carrier, through its agents or servants, knows or has opportunity to know, of threatened injury or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precautions, or to use proper means, to prevent or mitigate such injury, the carrier is liable. (*Post*, pp. 675, 676.)

Case cited and approved: *Ferry Cos. v. White*, 99 Tenn., 256.

2. **SAME.** Same. Case in judgment.

Where a number of drunken and boisterous passengers on a railroad train exploded dynamite sticks in the cars and on the platforms, and fired pistols, and the carrier's servants, though knowing or having an opportunity to know of such acts, neglected to take the proper precautions to prevent injury to others, and the plaintiff, another passenger, was shot by the discharge of a pistol in the hands of one of this drunken party, alleged to be accidental, the railroad is liable for the injury so sustained.

*As to liability of carrier for assault upon passenger by strikers, mobs, or third person, see note to *Fewings v. Mendenhall* (Minn.), 55 L. R. A., 713.

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FROM HENDERSON.

Appeal from the Circuit Court of Henderson County.
—LEVI S. WOODS, Judge.

T. A. LANCASTER, for Railroad.

BARHAM & DAVIS and M. F. OZIER, for Flake.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

A boy thirteen years of age, while riding on one of the passenger trains of the plaintiff in error on the afternoon of the 24th of December, 1903, while en route from Huron, a small station on the line of the railway, to Lexington, in this State, was shot. He was wounded by a pistol fired by a party whose name was unknown, and this suit was brought to recover damages for the injury thus received, upon the theory that the conditions existing upon that train, which either were known or should have been known to those in charge, were such as to have caused them reasonably to anticipate this result, and, failing to exercise proper diligence, the plaintiff in error was liable. There was a verdict and judgment in favor of the plaintiff, and the case has been brought into

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this court for review. A number of errors have been assigned, all of which save one are disposed of in a memorandum opinion which is not intended for publication. The one not there embraced is regarded as of sufficient importance for an opinion to be carried into our reports.

The record shows that at Jackson, Tennessee, the train in question was boarded by a number of persons then under the influence of strong drink. These parties carried upon the cars bottles of liquor, from which they freely drank as the train proceeded. They were boisterous in manner and speech, and by their conduct attracted the attention and gave considerable alarm to other passengers. They had possession of dynamite sticks, on which they placed caps. These, on being struck upon the floor, exploded. These explosions were as loud as pistol shots. While one or more of these explosions took place in the coach in which the defendant in error was riding, the others were produced upon the platform outside. Young Flake entered the coach, in which he was sitting at the time he received his wound, at Huron. He took his seat just back of the water cooler, with his face fronting in the direction the train was moving. This coach was immediately in the rear of the smoking car. In it were crowded many passengers, filling all the seats and occupying the aisle. The parties who have been referred to as boisterous, or at least some of them, came occasionally into this coach, elbowing their way

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down the aisle, and after remaining for a few minutes, would retrace their steps, and on passing out they either stopped upon the platform or else would enter the smoking car. The passengers in this coach observed that they were under the influence of liquor. Loud and boisterous talking in the smoking car was heard. Much firing was done on the platform between the coach and the smoking car. This firing began soon after the train left Jackson, and continued at intervals until this boy was shot. Unquestionably, some of the explosions which occurred on this platform came from the use of dynamite sticks, but some were from the use of pistols in the hands of some of these parties. One of them made an effort to have a witness, whose testimony is in the record, shoot a negro, who, at one of the stations along the line of the road, rode for a short distance upon the steps of this smoking car while engaged talking to a friend on the platform, offering him a pistol for that purpose. The witness, however, declined the offer. Immediately after the firing of the shot that wounded young Flake, one of these rowdies, with a pistol in his hand, went out of the coach to the platform, and stated that his weapon had accidentally been discharged, and he had wounded a boy.

The employees in charge of the train testify that they saw no one with pistols, and heard no firing. They say that there were crowds collected at the stations along the railroad, consisting of whites and negroes, engaged in shooting firecrackers and otherwise making a noise

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as such crowds will do in anticipation of Christmas. They further testify that there was some boisterous conduct in the smoker, which, however, was promptly suppressed by the manager of trains, who happened to be on board at that time. They deny that they knew, save for the single incident just referred to, of any improper conduct committed by any one, either on the platform or in the coaches making up that train. The jury evidently credited those witnesses who testified so positively with regard to the shooting of pistols and other explosives on the platform, as well as to the boisterous conduct in the coach, and believed, where so many persons were aware of these things, that the railroad employees either knew, or by the slightest diligence might have been informed of them. That the jury imputed the wound of this boy to the failure of those in control of the train to discharge their duty is evident from the verdict which was rendered. While it is true they could not foresee the wounding of the defendant in error, yet they should have anticipated that drunken ruffians armed with pistols, unless suppressed, would either accidentally or intentionally inflict injury upon their fellow passengers.

We think there is abundant evidence to support the verdict of the jury, and to indicate that they were inexcusably negligent in preserving order. The principle of law controlling in the case is that "wherever a carrier, through its agents or servants, knows, or has opportunity to know, of threatened injury, or might have reasonably anticipated the happening of an injury, and fails

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or neglects to take the proper precaution, or to use proper means, to prevent or mitigate such injury, the carrier is liable." 5 Am. & Eng. Ency. of Law, p. 553.

This rule was applied in *Ferry Cos. v. White*, 99 Tenn., 256, 41 S. W., 583. In that case the court quoted and approved a clause from the charge of Shipman, J., given to the jury in a suit involving the liability of a steamer and its owners for an injury sustained by one passenger from the violence of a fellow passenger. This clause was as follows: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might be reasonably anticipated, or naturally be expected to occur, in view of all the circumstances, and of the number and character of persons on board."

Public policy requires the strict enforcement of this rule. No relaxation of it should be indulged by the courts. The comfort and safety of passengers who commit themselves to a carrier depend upon it. The facts of the present case eminently call for its application.

We are satisfied no error was committed by the trial judge in his charge, embodying as it did this rule of liability, and his judgment is therefore affirmed with costs.

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MEMPHIS TRUST COMPANY v. R. A. SPEED, Clerk.

*(Jackson. April Term, 1905.)***1. COLLATERAL INHERITANCE AND SUCCESSION TAX.**

Property taken in kind by a widow in payment of a bequest of one-half of the residue of the estate is not subject to, when.

Where a nonresident devised and bequeathed one half of the residue of his estate to his wife, and died the owner of personal property in this State, which was a part of the residue of his estate, a portion of which she elected to take at a fair valuation as compared with the balance of the residuary estate wherever situated, and the executor transferred it to her in kind, in payment and satisfaction of her one-half interest in the residuary estate, such property so taken by the widow is not subject to the collateral inheritance and succession tax.

Code cited and construed: Secs. 724, 735.

Acts cited and construed: 1893, ch. 174, secs. 1, 10; 1893, ch. 89, sec. 7.

Code cited and construed: Secs. 724, 735 (S.).

2. SAME. Clear or net value of share of estate after deduction of debts, etc., subject to.

Debts owed by the decedent must be deducted from the aggregate value of the estate before it can be ascertained what amount is subject to the collateral inheritance and succession tax; for the tax shall be levied on the clear value of the estate so passing, and it is the net value of the share of the estate inherited by or willed to the collateral kindred that is subject to the tax. (*Post*, p. 691.)

Acts cited and construed: 1893, ch. 89, sec. 7; 1893, ch. 174, sec. 1.

Cases cited and approved: *Callahan v. Woodbridge*, 171 Mass., 595; *In re King*, 172 N. Y., 616.

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3. **SAME.** Same. But Tennessee debts of a nonresident testator will not be deducted from Tennessee assets subject to, when. But Tennessee debts paid by the executor before the institution of tax proceedings and not shown to have been paid out of the Tennessee assets cannot be deducted from the Tennessee assets passing to collateral kindred under the will of a nonresident and subject to the collateral inheritance and succession tax. (*Post*, pp. 691, 692.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.
—J. P. YOUNG, Judge.

S. J. SHEPHERD, for Trust Company.

ATTORNEY-GENERAL CATES, W. P. ELDRIDGE, and
G. P. SMITH, for Speed.

MR. JUSTICE M'ALISTER delivered the opinion of the Court.

The question presented for determination upon this record is whether \$20,000 of stock in the Bank of Commerce is subject to a collateral inheritance tax. It appears that Bem Price died domiciled in the State of Mississippi, and left an estate in Tennessee appraised at the value of \$34,000. The deceased left a last will and testament, of which the Memphis Trust Company was duly

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appointed executor by the chancery court of Mississippi, and ancillary letters testamentary have been granted to it by the probate court of Shelby county, Tennessee. It is averred that such ancillary letters testamentary were only granted to said trust company for the purpose of enabling it to collect and secure possession of certain assets, and also to enable it to pay off and discharge certain debts which were due and owing in the State of Tennessee. The will provides as follows: "I give and bequeath and devise to my beloved wife, Mary D. Price, my home place consisting of 105 acres, more or less with all improvements thereon situated in the town of Oxford, Mississippi, and on the west side of North street in said town. I also give to my wife all of the household furniture in said house, my carriage and horses and such of my milk cows as she may desire for her private use. I also give and devise to my wife, Mary D. Price, the tract of land containing 40 acres more or less and situated on the north side of the town cemetery in Oxford, Mississippi. I further give, bequeath and devise to my wife, Mary D. Price, one half of all the residue of my estate whether real or personal or mixed and wherever located and I request and desire her to entrust to the Memphis Trust Company that portion of my estate given to her except," etc.

The trust company, in its answer, states that in the division of the estate of the late Bem Price his stock in the National Bank of Commerce embraced in the appraisal was selected by and set apart to Mrs. Mary

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D. Price, widow of testator, as a part and portion of one-half of his estate to which she was entitled under the terms of his will. Defendant further avers that Mary D. Price had the right to select and insist upon the shares of stock in the National Bank of Commerce as a part and portion of her one-half interest in the estate of her deceased husband, and that this respondent, as executor, had no right to object to her selection of said stock, provided only it was taken at a fair valuation, which was actually done.

Respondent therefore avers that, inasmuch as the shares of stock in the National Bank of Commerce were never held in any way by the collateral relatives of testator, it is not responsible or liable for any collateral inheritance tax thereon. Respondent further stated that said stock in the National Bank of Commerce was set apart for said Mary D. Price in kind, and so transferred to her.

Respondent further avers that at the time of the death of Bem Price, he was indebted to the National Bank of Commerce, which is a Tennessee corporation, in the sum of \$7,539, and also owed to said National Bank of Commerce an additional sum of \$5,000, thus making a total indebtedness of said Bem Price in the State of Tennessee of the sum of \$12,539.

Respondent further avers that it is its duty to set off and charge against the value of stock in the Memphis Trust Company the indebtedness of said Bem Price due to Tennessee creditors, inasmuch as this stock consti-

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tutes a fund peculiarly and especially liable therefor. Respondent therefore avers that after the allotment to Mrs. Mary D. Price, widow of testator, of the stock in the National Bank of Commerce, which she selected in kind, as she had a right to do, and after charging against the stock in the Memphis Trust Company the amount of the indebtedness due to the estate of Bem Price, no personal assets or assets of any kind remain in the State of Tennessee subject to a collateral inheritance tax or other tax of any kind. It appears from the record that Gilmer P. Smith was appointed by R. A. Speed, county court clerk, to appraise the estate of Bem Price, deceased, situated in Shelby county, Tennessee, which was or might be liable to taxation under the collateral inheritance tax law. The appraiser found that at the time of testator's death he was the owner of one hundred shares of stock, par value, of the Memphis Trust Company, and also owned one hundred shares of stock in the National Bank of Commerce, also at par value. The value of all this stock was assessed by the appraiser at \$34,000. The appraiser was asked the following question: "Question 4. In answer to question 2 you say that the Tennessee property of this estate amounted to \$34,000, and in answer to question 3 you say you only appraised for taxation \$17,000 or rather you only found \$17,000 subject to taxation. Explain why you only found this amount subject to taxation, and not the whole \$34,000. Ans. The \$34,000 referred to in question 2 was the total valuation

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of the Tennessee property belonging to this estate, and by the terms of the will of Bem Price one-half of this property went to his wife, namely \$17,000. Under the collateral inheritance tax law any property left to or inherited by the wife of the deceased from the deceased's estate is not subject to collateral inheritance tax. Now, by the will of Bem Price, one-half his property went to his wife, and he did not designate any particular parts of the property to go to her, and as he gave no election of the kind she was to have, I assume she, of course, took one-half of this \$34,000 worth in Tennessee property; consequently only the half left to collaterals was subject to taxation, and I therefore only appraised half for taxation, and so reported."

The circuit judge, who heard the cause without the intervention of a jury, found that Bem Price, resident of the State of Mississippi, died, leaving an estate in Tennessee, which, from report of appraiser, appeared to be of value of \$34,000, "and it appearing that under the will of said Bem Price one-half of his entire estate (exclusive of specific bequests and legacies to his wife) was devised and bequeathed to his wife, Mary D. Price, and the other one-half to said collateral relatives and strangers in blood mentioned in said will, it is therefore adjudged by the court that said estate pay a collateral inheritance tax of five per cent on one-half of the valuation of said estate, or \$17,000, amounting to the sum of \$850, together with fee of \$127.50 to W. B. Eldridge, attorney for R. A. Speed, together with the costs of this cause." The court declined to allow exemption of \$12,739 on the

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debts due by the estate of Bem Price in the State of Tennessee, though the court recites the fact that such debts existed and were Tennessee debts. The court further found that the setting apart to Mary D. Price, wife of testator, of the stock in the Bank of Commerce, did not exempt said stock, or any part thereof, from liability for the collateral inheritance tax. The Memphis Trust Company, as executor, appealed from this decree, and has assigned the following errors: (1) The court erred in estimating the stock in the National Bank of Commerce which had been set apart to Mrs. Mary D. Price, widow of testator, as a basis upon which collateral inheritance tax, or any part thereof, could be assessed. (2) The court erred in refusing to consider the indebtedness of \$12,539, due by Bem Price to Tennessee creditors in estimating the collateral inheritance tax due on his estate or any part thereof.

In support of the first assignment of error counsel for the Memphis Trust Company propounds the proposition that there can be no claim for collateral inheritance tax upon the stock in the Bank of Commerce, because that has been selected by, and has become the property of, the widow, and under the provision of the collateral inheritance tax law of 1893 property inherited by or bequeathed to the widow is exempt.

It is undoubtedly true that under the Act of 1893 property passing to the widow from the testator is not subject to collateral inheritance tax, for the plain reason that the widow is exempt from its provisions. But the

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contention is that the widow had no right to elect under the will and its codicils to take any particular portion of decedent's property after the payment of specific legacies and devises. As already seen, testator made specific bequests to his wife, and then a general bequest of one-half of the residuary property. The argument is that, if the testator had intended that his widow should have the right to make selection of one-half of the remainder of his property, he would have so directed in his will. This intention, it is claimed, is excluded by the specific bequests and the general bequest of one-half of the remainder of the estate. It is further insisted that the fact that the executor permitted the widow to take the National Bank of Commerce stock as her share of the residuary estate did not bind the estate, nor relieve the executor of the payment of collateral inheritance tax on this stock. The argument seems to be based upon the following language in the Act of 1893, namely: "And all owners of such estates and all executors and administrators, and their sureties, shall only be discharged from liability for the amount of such taxes and duty, the settlement of which they may be charged with by having paid the same over for the use of the State as hereinafter directed.." Shannon's Code, section 724; section 1, c. 174, p. 347, Acts 1893. Counsel then cites section 10, c. 174, p. 350, Act 1893, which provides as follows: "Whenever any foreign executor or administrator or trustee shall assign or transfer any stock, or loans in this State standing in the name of decedent, such tax

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shall be paid, on transfer thereof, to the clerk of the county court where such transfer is made; otherwise the corporation or person permitting such transfer shall become liable to pay such tax." Shannon's Code, section 735. It is therefore the contention of the State that, as Bem Price left property in the State of Tennessee, consisting of one hundred shares of stock in the National Bank of Commerce, and one hundred shares of stock in the Memphis Trust Company, it was the duty of the executor, when the National Bank of Commerce stock was turned over to Mrs. Mary D. Price, widow, to pay to the county court clerk collateral inheritance tax based upon the value of one-half of said stock, as under the will only one-half of said stock could go to the widow, and this property was clearly divisible in kind. It is further argued that the widow could make no selection of property she wished to take, nor could the executor assent to allotment of such specific property so chosen. Act 1893, p. 347, c. 174, section 1, and Act 1893, p. 146, c. 89, section 7, provides as follows: "All estates—real, personal and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State, passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this State, or any part of such estate or estates or interest therein transferred by deed, grant, bargain, gift or sale, made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the

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grantor or bargainor to any person or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of the father, mother, brother, sister, the wife or widow of a son, or husband of a daughter, or any child or children adopted as such in conformity with the laws of the State of Tennessee, husband, wife, children, and lineal descendants born in lawful wedlock of the person dying seized and possessed thereof, shall be subject to a duty or tax of five dollars on every hundred dollars of the clear value of such estate or estates so passing, and at and after the same rate for any less amount, to be paid to the use of the State," etc. So it is very clear, and counsel concede the proposition, that no property passing to the widow under the provisions of this act is subject to the payment of collateral inheritance tax; but the main contention of counsel for the State is that under the residuary clause of this will the wife has no right to make a selection of specific property left in the residuary estate. This question arose in the *Matter of James*, 144 N. Y., 6, 38 N. E., 961. In that case the question arose on a construction of the collateral inheritance tax law of New York, which is substantially similar to the Tennessee Act of 1893. The facts were that at the time of his death in Africa testator was a citizen of the Kingdom of Great Britain, and was domiciled there. By his last will, which he had made at the place of his domicile, he disposed of a very large estate. He left property in Great Britain, which was valued at \$447,630, and property in this country, which was val-

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ued at \$2,303,472.53. He gave legacies to collateral relatives and charities, which in the aggregate amounted to \$236,810. The residue of his estate was given to his executors, upon trust for the benefit of his two brothers. The charitable bequests were to foreign corporations, and persons to whom legacies were given were residents of Great Britain, with the exception of two, who resided in this country. He left no debts here. His will was proven in England in June, 1890, and afterwards, as a result of an action brought in the courts of this State (New York) by the executors, was established here, and letters testamentary were issued thereon to John Arthur Jones, one of the executors named, and also a resident of Great Britain. He applied to the surrogate of the county of New York for the appointment of an appraiser for the purpose of appraisal under the laws of this State imposing a tax upon gifts, legacies, and collateral inheritances. It appeared that by the will the legacies were to be paid within three months of testator's death free of duty; that a portion of the amount given as legacies had already been paid in Great Britain out of the estate there, together with the duties imposed on legacies by the law of that country, and that the property in this country consisted, among other things, in stocks and bonds of corporations of this and other States, which securities were deposited in this State at the time of testator's death.

On these facts the court of appeals of New York, in the midst of its opinion, said: "In the present case the

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property which testator died possessed of in Great Britain is largely in excess of the amount given by him in legacies. Some portion of that has already been paid from the English estate, and the executor has declared his determination of appropriating that part of testator's property to their payment, so that the American estate shall constitute the residuary estate disposed of by the will in favor of the testator's brothers. This he may rightly do, and thus save the estate from the payment of the succession taxes imposed by our laws. The fact of such an appropriation will, of course, appear upon his accounting. If the executor determines to pay the legacies from the English estate, the American estate is thereby freed from the burden of the special taxes, the imposition of which depends upon the fact of a succession by the legatee to some property which is within the State. If the American estate is appropriated to persons who are within the exempted degrees of relationship to testator, the right to claim the tax from executor is gone. It does not lie with the officers of the State to say in such a case which part of testator's property shall be appropriated to the payment of the legacies. The law is not arbitrary in its application. It is simply absolute in its requirements, when the precise case arises which it was framed to meet; and where, as here, the case is not presented of an appropriation of any part of the American estate in payment of legacies to foreign legatees, this special tax law can not and should not apply."

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It will be seen from the excerpt of the opinion that the New York case bears a striking analogy in some of its essential features to the case now under consideration. The reasoning of the court commends itself to our judgment, and without further elaboration we hold that the executor of the estate of Bem Price had a right, upon the election of the widow, to transfer to her the stock in the National Bank of Commerce in payment of her one-half interest in the residuary estate; provided, of course, it was taken at a fair valuation as compared with the balance of the residuary estate wherever situated. The stock in the Memphis Trust Company, amounting to \$14,000, which, under the will, goes to collateral kindred and strangers in blood, is clearly subject to the tax.

The second assignment is that the court should have allowed, as against any collateral tax imposed on the stock in the Memphis Trust Company, and valued by the appraiser at \$14,000, the indebtedness of \$12,539 due creditors in the State of Tennessee. It is well to understand in the first place whether there are any debts outstanding in this State which are due from the estate of Bem Price, and the character of that indebtedness. We find this matter explained in the deposition of Mr. John H. Watkins, vice president of the Memphis Trust Company, as follows: "Q. State what debts, if any, were due by the estate of Bem Price to creditors in the State of Tennessee. Ans. At the time of the death of Bem Price he was indebted to the National Bank of

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Commerce in the sum of about \$7,539. He also owed the National Bank of Commerce the sum of \$5,000. This last item was two-thirds of a debt of \$7,500 due by the firm of Price & Price, of which he was a member, and in which he had an interest of two-thirds, being responsible, of course, for two-thirds of its debts. These debts have been paid off, and the estate of Bem Price now owes no debts to creditors in Tennessee." Again, the witness was asked: "Did the general estate of Price pay the firm debts, or were they paid out of his individual estate? Ans. The firm of Price & Price was solvent, and it paid the indebtedness of \$7,500 to the Bank of Commerce, of which amount \$5,000 was owed by Bem Price. The individual estate of Bem Price did not pay this \$7,500."

Again, the witness was asked: "What relationship did this Tennessee debt of \$12,539.00 bear to his entire indebtedness? Ans. About fifty per cent. Q. For this debt did the Bank of Commerce have any security? If so, what was it? Was it exhausted before other property was used in paying these two debts? Ans. The indebtedness of Price & Price to the Bank of Commerce, amounting to \$7,500, was secured to the Bank of Commerce by eighty shares of stock in the Bank of Oxford, belonging to Bem Price, which was deposited as collateral. None of this security was used or exhausted in paying the debt."

Again, this witness was asked: "What per cent or part of this whole estate were the Bank of Commerce

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stock and the Memphis Trust Company stock? Ans. Twelve and one-half per cent., or one-eighth."

It may be conceded as sound law that debts must be deducted from the aggregate value of the estate before it can be ascertained what amount is subject to the inheritance tax. *Callahan v. Woodbridge*, 171 Mass., 595, 51 N. E., 176; *Matter of King*, 172 N. Y., 616, 64 N. E., 1122. The Tennessee Act of 1893, already quoted supra, provides that the tax shall be levied on the clear value of the estate so passing.

It is the net value of the share of the estate inherited by or devised to the collateral kindred that is subject to the tax. In the present case one of the debts due Tennessee creditors was an individual debt of the testator, and the other an indebtedness of a partnership wherein he owned a two-thirds interest. Both debts have been paid, and were paid before the institution of the tax proceedings herein. It does not appear that the individual debt was discharged with Tennessee assets, and we have no concern with the partnership debt, since that was discharged with firm assets. We infer that the individual indebtedness of Bem Price to the National Bank of Commerce for \$7,539 was paid with Mississippi assets, since the appraiser found that the entire value of the estate in Tennessee was \$34,000, and that amount still remained intact for distribution when the appraisement was made.

In addition to this, if the executor sought to deduct debts due Tennessee creditors from the shares of the es-

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tate passing to the collateral kindred, it was incumbent on it to show they were discharged with Tennessee assets. This fact does not appear in the record. We concur with the circuit judge in disallowing these debts as credits on the stock of the Memphis Trust Company appraised for taxation at \$14,000. We nonconcur with the circuit judge in his holding that the setting apart of the stock in the Bank of Commerce to the widow did not exempt said stock, or any part thereof, from liability for the collateral inheritance tax. We hold that the part of said stock so set apart to the widow is exempt from said tax. We think the fee allowed the attorney for the county court clerk was altogether proper and reasonable.

For the reasons stated herein, the judgment of the circuit court is affirmed.

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PEASE & DWYER v. STATE NATIONAL BANK.*

(Jackson. April Term, 1905.)

1. **BANK CHECK.** Payment may be stopped by drawer before acceptance.

The drawer of a check in the usual form upon his general account with a bank, firm, or other person, before it is accepted, expressly or by implication, may revoke it, and forbid its payment, and any subsequent payment by the bank is made at its peril. (*Post*, pp. 694-698.)

Acts cited and construed: Negotiable Instruments Law, Acts 1899, ch. 94, sec. 189.

Cases cited and approved: *Imboden v. Perrie*, 13 Lea, 505; *Pickle v. Muse*, 88 Tenn., 385; *Akin v. Jones*, 93 Tenn., 356; *Attorney-General v. Insurance Co.*, 71 N. Y., 325; *Lunt v. Bank*, 49 Barb., 221; *Bank v. Bank*, 118 Pa., 313; *Kahn v. Walton*, 46 Ohio St., 205; *Mining Co. v. Brown*, 124 U. S., 391; *Railroad v. Johnston*, 133 U. S., 574; *Bank v. Yardley*, 165 U. S., 634; *Schneider v. Bank*, 1 Daly (N. Y.), 501; *O'Connor v. Bank*, 124 N. Y., 332; *Randolph v. Allen*, 19 C. C. A., 353; *State v. Bank*, 49 La. Ann., 1078; *House v. Kountze*, 17 Tex. Civ. App., 406; *Sunderlin v. Bank*, 116 Mich., 284.

2. **SAME.** Drawer is precluded from stopping payment where it was the intention to assign the specific fund, when.

There are cases in which this general rule, stated in the foregoing headnote, does not apply, but it must be clearly shown in such cases that it was the intention of the parties to assign all, or part, of the specific fund on deposit. (*Post*, p. 698.)

Case cited and approved: *Bank v. Yardley*, 165 U. S., 634.

* As to right to stop payment of check, see note to *Canterbury v. Bank of Sparta* (Wis.), 30 L. R. A., 845.

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3. **SAME.** Payment by drawee bank after stoppage of payment is not ratified by drawer's suit against payee, when.

The mere institution of suit by the drawer of a bank check against the payee to recover the amount thereof is not a ratification of the act of the drawee bank in paying the check after instructions to refuse payment, especially where the facts stated in connection therewith are not sufficient to show a ratification of the payment of the revoked check. (*Post*, pp. 698-699.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
H. F. HEISKELL, Chancellor.

CARROLL, M'KELLAR, BULLINGTON & BIGGS, for complainant.

HUNSTON & CARY, for defendant.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

Complainant, a corporation and depositor with the defendant, the State National Bank, having a balance to its credit of more than \$5,000, drew a check thereon July 19, 1904, payable to the order of J. W. Dickson & Co., for \$600, and delivered it to the payee. Three days later, July 21, 1904, complainant instructed the defendant to refuse payment of the check, which instruction it ig-

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nored, and paid the check July 25, 1904, charged it to the account of the complainant, deducted it from its balance, and afterwards refused to account for the money when demanded.

This bill is brought to recover the proceeds of the check, and interest thereon from the day when paid. The chancellor decreed in favor of the complainant, and defendant has appealed and assigned errors.

We are of the opinion that there is no error in the decree of the chancellor. The drawer of a check in the usual form, upon his general account with a bank, firm, or person, before it is accepted, expressly or by implication, may revoke it and forbid its payment, after which payment, if made, is at the peril of the bank. A check of this kind is not an appropriation of any part of the funds to the credit of the drawer with the bank, and does not constitute any claim or right of action against the bank until it is accepted or certified by it. The remedy of the holder, if payment is refused, is against the drawer. Negotiable Instrument Law, Acts 1899, p. 172, c. 94, section 189; *Imboden v. Perrie*, 81 Tenn., 505; *Pickle v. Muse*, 88 Tenn., 385, 12 S. W., 919, 7 L. R. A., 93, 17 Am. St. Rep., 900; *Akin v. Jones*, 93 Tenn., 356, 27 S. W., 669, 25 L. R. A., 523, 42 Am. St. Rep., 921.

In *Imboden v. Perrie*, 81 Tenn., 505, *supra*, the contest was between a creditor whose attachment was levied by garnishment upon the balance of a depositor in a bank, and the payee in a check drawn upon the bank before

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the levy of the attachment, and presented afterwards. This court quotes approvingly from *Attorney-General v. Continental Life Insurance Co.*, 71 N. Y., 325, 27 Am. Rep., 55, this statement of the law concerning the relations of banks, their depositors, and the holders of unaccepted checks: "Church, C. J., said: '*Lunt v. Bank of North America*, 49 Barb., 221, declares the rule accurately, that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual requests, are of the same legal effect as are inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank.

" 'This doctrine accords with the relations between the parties. Banks are debtors to their customers for the amount of their deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee, to the fund. Before acceptance, the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment.' "

The facts of the case of *German National Bank v. Farmers' Dep. National Bank*, 118 Pa., 313, 12 Atl., 305, were similar to those in the case of *Imboden v. Perrie*. It is there said:

"I presume no one at this day questions the right of

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the drawer of a check to stop the payment thereof. This is usually done by notice to the bank on which the check is drawn. If the bank pay after such notice, it does so at its peril. The holder of a check has no remedy against the bank upon which a check is drawn for its refusal to pay it. He must look to the drawer."

In the case of *Kahn v. Walton*, 46 Ohio St., 205, 20 N. E., 203, involving this direct question, it is said:

"A check, being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory, and, of course, revocable at any time before the bank has paid it or committed itself to its payment. . . . The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder except under the drawer's directions until by virtue of those directions, it assumes some obligation to the holder; up to that time the latest order from the drawer governs."

In the case of *Florence Mining Company v. Brown, Receiver, etc.*, 124 U. S., 391, 8 Sup. Ct., 534, 31 L. Ed., 424, Mr. Justice Field says:

"A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not properly capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment for-

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bidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment."

Further cases in accord with these are: *St. Louis & San Francisco Ry. Co. v. Johnston*, 133 U. S., 574, 10 Sup. Ct., 390, 33 L. Ed., 683; *Fourth St. Nat. Bank v. Yardley*, 165 U. S., 634, 17 Sup. Ct., 439, 41 L. Ed., 855; *Schneider v. Bank*, 1 Daly (N. Y.), 501; *O'Connor v. Mechanics' Nat. Bank*, 124 N. Y., 332, 26 N. E., 816; *Randolph v. Allen*, 73 Fed., 42, 19 C. C. A., 353; *State v. Bank of Commerce*, 49 La. Ann., 1078, 22 South., 207; *House v. Kountze*, 17 Tex. Civ. App., 406, 43 S. W., 561; *Sunderlin v. Mescosta County Saving Bank*, 116 Mich., 284, 74 N. W., 478.

There are cases in which this general rule does not apply, but the fact must clearly show that it was the intention of the parties to assign all or part of the specific fund on deposit. *Fourth Street Nat. Bank v. Yardley*, 165 U. S., 634, 17 Sup. Ct., 439, 41 L. Ed., 855.

The insistence of the defendant is that the check was countermanded by complainant not for its own benefit, but for that of the payee, that before payment was forbidden the check had passed into the hands of a bona fide holder for value and without notice, and that the bank, having paid it, is in equity a purchaser, and has the right to set it off against the claim of complainant; and, further, that complainant ratified the payment of the check after it was done by bringing suit against the

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payees, J. W. Dickson & Co., to recover the sum for which it was drawn, and interest.

We can see no force in the first insistence but it is not necessary to pass upon it, as there is no proof to sustain it.

It is true that a check payable to order is a negotiable instrument, and, in the hands of an indorsee for value and without notice, it is a valid indebtedness of the drawer. But no such case is presented by this record. It does not appear that the check was indorsed or passed to any one by J. W. Dickson & Co., or to whom it was paid by the bank. The only references we find to an indorsement of it are in the answer and brief of the defendant.

There is evidence, brought out upon the cross-examination of a witness for complainant, that previous to this suit complainant brought one against J. W. Dickson & Co. and others to recover the proceeds of the check, but the record in that case is not in the transcript in this one.

It further appears that the defendant was also sued in the same case with J. W. Dickson & Co., and the bill afterwards dismissed as to it; but we do not know what relief was prayed against the defendant, and the facts stated are not sufficient to show a ratification of the payment of the revoked check.

We are therefore of the opinion that the payment of the check after it was countermanded by the complainant was unauthorized, and that the decree of the chancellor awarding a recovery in favor of the drawer should be affirmed, with costs, and it is accordingly so decreed.

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T. B. WALKER, EXR., v. JAMES BOBBITT *et al.***(*Jackson*. April Term, 1905.)**

1. **WILLS.** Satisfaction of legacy in remainder inures to the benefit of the balance of the remainder estate undisposed of by the will, when.

Where a will gives the whole estate to one for life and two-thirds thereof in remainder to another, without disposing of the other third in remainder, and the life tenant, as executor, satisfies, with funds of the estate, the legacy to the remainderman, the whole of the balance of the estate thus left upon this settlement constitutes a portion of testator's estate undisposed of by the will after the termination of the life estate. (*Post*, pp. 703, 704.)

2. **SAME.** Of husband giving widow whole estate for life, and her acceptance thereunder, does not deprive her of remainder in land held by them by the entirety; election not applicable.

Where a husband devises to his wife all of his estate, both real and personal, for life, and the only interest the testator had in any land was that in a tract of land held by him and his wife by the entirety, the wife took by survivorship the entire interest in the said tract of land, and was not deprived of the remainder estate therein, notwithstanding she took under the will, and accepted its provisions, for the doctrine of election is not applicable to such a case. (*Post*, pp. 704, 705.)

Cases cited and approved: *Manufacturing Co. v. Collier*, 95 Tenn., 115; *Dashwood v. Peyton*, 18 Ves., 41; *McGinnis v. McGinnis*, 1 Ga., 496; *Havens v. Sackett*, 15 N. Y., 365; *Leonard v. Steele*, 4 Barb., 20.

3. **SAME.** Widow failing to dissent from husband's will is excluded from intestate personalty.

Where a widow fails to dissent from her husband's will within the time and manner provided by statute, and the husband

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died intestate as to a portion of his personal property, the same passes to his distributees to the exclusion of the widow. (*Post*, pp. 705-710.)

Code cited and construed: Secs. 4146, 4147, 4172 (S.); secs. 3251, 3252, 3278 (M. & V.); secs. 2404, 2429 (T. & S. and 1858); sec. 2404a (T. & S.)

Acts cited and construed: 1766, ch. 3, sec. 1; 1784 (April ses.), ch. 22, sec. 8; 1859-60, ch. 3, sec. 1.

Cases cited and approved: *Malone v. Majors*, 8 Hum., 577; *McClung v. Sneed*, 3 Head, 218; *Waddle v. Terry*, 4 Cold., 51; *Waterbury v. Netherland*, 6 Hels., 513.

Case overruled: *Demoss v. Demoss*, 7 Cold., 256.

4. **STATUTES.** Reenacted statute should have same judicial interpretation that was given to the earlier statute.

Where a statute has received a judicial interpretation, and it is reenacted, it will be presumed the legislature intended it should have the same construction which was given to the earlier statute. (*Post*, pp. 709, 710.)

Cases cited and approved: *Malone v. Majors*, 8 Hum., 577; *Bates v. Sullivan*, 3 Head, 632; *Waddle v. Terry*, 4 Cold., 51; *Hospital v. Fuqua*, 1 Lea, 608.

FROM HENRY.

Appeal from the Chancery Court of Henry County.—
A. G. HAWKINS, Chancellor.

LAMB & MARR, QUINTIN RANKIN, and W. S. COULTER,
for complainant.

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FARABAUGH & RYE, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

One Henry Bobbitt died intestate in Henry county, Tennessee, in the year 1890. He left surviving him a widow, Jane Bobbitt, but no lineal descendants. While the owner of some personal property, the only real estate in which he had an interest at the date of the making of his will or at any time thereafter was in a tract of one hundred acres lying in that county, which had been conveyed to him and his wife, and of which they owned the estate by entirety.

In the first clause of his will the testator provided for the payment of his funeral expenses and his debts, and by the third clause he nominated his wife, Jane, as executrix. The second clause of the will is as follows: "I give and bequeath to my beloved wife, Jane Bobbitt, all of my estate, both real and personal for and during her natural life, and at her death, I will and bequeath two-thirds of whatever may remain to the Hopewell presbytery, of the Cumberland Presbyterian Church, to be used by said presbytery in any way they may see proper." By a codicil to the will, duly executed, the two-thirds interest given in this clause to Hopewell presbytery was changed so as to give it to the trustees of the Cumberland University for the endowment of the theological department. It will be observed that the testator made

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no disposition of the other one-third remainder interest in either his real estate or personal property.

Upon his death, his wife, surviving him, took upon herself the execution of the will, and at the same time accepted its benefits. From sources not disclosed in the record she received as executrix \$6,168.81 from personalty belonging to the estate. From this she paid to the trustees of Cumberland University the sum of \$2,000, which was received by them in full satisfaction of the residuary legacy given to them by the codicil. This payment left in her hands the sum of \$4,168.81, derived from the personal estate of the testator. She also sold the tract of land of which mention has been made, and received therefor the sum of \$4,000. Subsequently she died, leaving a will by the terms of which she gave all of her estate to certain of her collateral kindred. A controversy having arisen between these legatees and the distributees of Henry Bobbitt as to the ownership of these two funds, the present bill was filed by the executor of Mrs. Bobbitt's will, asking the chancery court to fix and determine the rights of the respective claimants to these funds.

As has already been stated, the testator, Henry Bobbitt, died intestate as to one-third of his estate, and no provision was made in his will for the contingency which subsequently occurred of the remaindermen, the trustees of the Cumberland University, taking a part for the whole of the two-thirds given to them. As to the balance thus left upon this settlement, it is clear that it also con-

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stituted a portion of his estate undisposed of by his will.

Upon these facts the chancellor held that, surviving her husband, Mrs. Bobbitt took the entire interest in the tract of land of one hundred acres, and that her right of survivorship was not affected by the doctrine of election invoked by the distributees of Henry Bobbitt, and further that, her husband having died intestate as to the portions of the personal estate, she took them under the general statute of distribution; the whole passing to the legatees named in her will. From his decree so holding the heirs and distributees of Henry Bobbitt have appealed and assigned errors.

We agree with the chancellor that the doctrine of election neither as to the land in question nor its proceeds can be invoked by the appellants. This doctrine properly arises where a testator manifests a clear intention to dispose of property not his own, and by other parts of his will from his own estate confers benefits upon the owner of that property. *Dashwood v. Peyton*, 18 Vesey, 41. In such case the owner is put upon his election, and if he accepts the benefits he is excluded or estopped from asserting claim to the property so disposed of. But as we understand, this rule or doctrine is not applied save in a case of property in which the testator has no interest. If he has some interest of his own (more than mere possession) in the thing disposed of, bequeathed by him, he will be deemed by his use of general terms to have intended only a bequest or a devise of his interest, and the owner will not be put to an election between maintain-

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ing his former title and claiming the new benefits provided by the will. *McGinnis v. McGinnis*, 1 Ga., 496; *Havens v. Sackett*, 15 N. Y., 365; *Leonard v. Steele*, 4 Barb., 20.

That the testator, Henry Bobbitt, had an interest in this realty at the time he made his will, is well settled. This continued in him until his death. This interest might ripen into a full and complete ownership upon the death of his wife leaving him surviving. We think the existence of this interest, upon principle as well as the authority of the cases cited, would preclude the application of the rule in question. This interest was a valuable one which his creditors might have reached and subjected by execution. *Mfg. Co. v. Collier*, 95 Tenn., 115, 31 S. W., 1000, 30 L. R. A., 315, 49 Am. St. Rep., 921. But the event which made the will operative (that is, his death) was the same which carried the whole estate in this land into Mrs. Bobbitt, by reason of the fact that she, of the two, was the longer liver.

The question as to the devolution of the personal estate of which Henry Bobbitt died intestate is now to be considered. In doing this it is necessary to examine the older statutes, as well as the Code provisions with regard to the distribution of the estate of persons dying intestate, and the cases in which some or all of these have been construed and applied.

At common law a devise to the wife by her husband did not prevent her from setting up claim to dower un-

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less it was so expressed in or arose by implication from the terms of the will too strong to be resisted; otherwise she could take both her dower and her bequest. This however, was changed by a provision in chapter 22 of the Acts of 1784. By section 8 of the act, among other things, it was provided that "if any person should die intestate, or make his last will and testament and not therein make any express provision for his wife by giving and devising unto her such part or parcel of his real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto before the judge of the circuit court . . . in open court within six months after the probate of said will, and then . . . she shall be entitled to dower . . . to wit one-third part of all the lands . . . of which her husband dies seised . . . and furthermore if such husband should die leaving no child, or not more than two, then in that case she shall be entitled to one-third part of the personal estate; but if he should die leaving more than two children, then, and in that case, such widow shall share equally with all the children, she being entitled to a child's part."

It will be seen this statute provides for widows belonging to two different classes, the first of which embraces those whose husbands died without leaving a will; and the second, widows who, being dissatisfied with the provisions in their favor made in the wills of their husbands, dissented therefrom in the manner and time fixed by the statute. A widow belonging to the second class

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by a statutory renunciation of the will was put upon the same plane with one whose husband died intestate, and both were let into the estate of their deceased husbands in the same decree.

So far as this act dealt with the case of a widow whose husband died intestate, it was but a re-enactment, with some modification, of section 1 of chapter 3 of the Acts of 1766; but the provision for the widow who, dissatisfied with, renounced, her husband's will, was a new departure.

By that statute, as was said in *Malone v. Majors*, 8 Humph., 577, "a provision for a wife in a will of itself forces her to elect whether she will take under or against the will, and that within six months from the probate of the will, for, if she do not express her dissent in open court within that time, the provision for her shall be considered as fully satisfactory to her." So it was held that the widow whose claims were there in controversy was not entitled to any part of the estate of which her husband died intestate.

Beyond all doubt, this was regarded as a sound interpretation of the statute, and it is a part of the judicial history of the State that, so construed, it was often applied by the courts. In *McClung v. Sneed*, 3 Head, 218, decided in 1859, but involving matters which arose many years prior thereto, in speaking of one whose husband had provided for her in his will, but who had failed to renounce the provision, the court said: "It is a settled

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law of this State that she is bound by its provisions, and can take no other part of his estate."

Thus stood the law at the compiling of the Code of 1858. Under section 2404 of that Code (Shannon's Code, section 4146) there was brought forward so much of section 8 of chapter 22 of the act of 1784 as related to the rights of a widow for whom provision was made in her husband's will, but who, dissatisfied therewith, dissented; the time for her dissent being extended to twelve months. As in the original act, it was there provided that such widow so dissenting should participate in his estate as if her husband had died intestate.

It will be observed that this section fails to fix (unlike the original act) the extent to which the dissenting widow would be permitted to share in his estate. As compiled, this was determined by section 2429 (Shannon's Code, section 4172), which provided in cases of intestacy, in the first subsection, that the personal estate of the intestate should go to the widow and children, or the descendants of children—the widow taking a child's share—and in the second subsection to the widow altogether, if there were no children nor the descendants of children. This omission in the codification was corrected by section 1, c. 3, of the Acts of 1859-60, which is in these words: "When a husband shall die leaving a will, from which the widow dissents within the time and in the manner provided by law, and leaving no child, or not more than two, his widow shall be entitled to one-third part of the personal estate, in addition to her dower in

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the real estate as provided by law. But, if the husband had more than two children, the widow shall share equally with all the children, she being entitled to a child's share." This now constitutes section 4147 of Shannon's Code.

So taking the provision of the Code with regard to the dissent by the widow from the will of her husband, and this section of the act of 1859-60, and we have in substance, and without marked change in phraseology, a reproduction of so much of the statute of 1784 as had regard to this matter. This being so, why should the court repudiate the construction so long acquiesced in of that statute?

It is a rule well established, and perhaps universally accepted by courts and textwriters, that where a statute has received a judicial interpretation, and it is re-enacted, it will be presumed the legislature intended it should have the same construction which was given to the earlier statute. Black on Inter. of Laws, 369; Sutherland on Stat. Con., sections 255, 256, 424; *Bates v. Sullivan*, 3 Head, 632; *Tenn. Hospital v. Fuqua*, 1 Lea, 608.

That this rule was recognized, at least by implication, and the construction given to the original statute in *Malone v. Majors*, supra, and other like cases, was assumed to be a part of its texture as re-enacted in the Code, is apparent in the case of *Waddle v. Terry*, 4 Cold., 51.

There Milligan, J., speaking for the court, said: "By our law (Code, section 2404) she [the widow] has the right, within one year after the probate of the will, to

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elect whether she will accept its provisions or . . . renounce them. . . . If she fails within the time limited to express her dissent according to the forms of law, she is held to be satisfied with the will, and bound by its provisions."

Still later, in *Waterbury v. Netherland*, 6 Heisk., 513, it is said that, from the failure of the widow to express her statutory dissent to her husband's will, it will be conclusively presumed she is satisfied with its provisions, and will not be permitted to share in any estate of which he died intestate.

We think this is a sound view of the law. However, a different one was expressed in *Demoss v. Demoss*, 7 Cold., 256. The rule there announced was the one applied by the chancellor in the present case. We have carefully examined the opinion in that case, and we are satisfied that its premises were unsound, and the conclusion there reached is in the face of the canon of interpretation to which reference has been made. It stands as against the great weight of authority. We regard it as misleading, and it is therefore overruled.

The result is that the decree of the chancellor is affirmed in so far as it disposed of the proceeds of the realty in question, and is reversed as to the personal estate of which Henry Bobbitt died intestate. Under the statute this estate passed to his distributees.

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RUDOLPH C. EHRLICH *v.* EMMA WEBER.*(Jackson. April Term, 1905.)*

1. **ALIENS.** Their children born in this country are citizens of this country.

Children born of alien parents in this country and under its jurisdiction become at once, by virtue of such birth, citizens of the United States. (*Post*, p. 716.)

Cases cited and approved: *United States v. Wong Kim Ark*, 169 U. S., 649.

2. **SAME.** Presumption that alienage continues.

The status of alienage of a foreigner is presumed to continue in the absence of proof that he denationalized himself or ceased to be a citizen of his native country, and the mere fact of long residence in this country is not sufficient to overcome this presumption. (*Post*, pp. 716, 717.)

Cases cited and approved: *Hauenstein v. Lynham*, 100 U. S., 483; *Green v. Salas* (C. C.), 31 Fed., 107; *Bode v. Trimmer*, 82 Cal., 517; *State, ex rel., v. Boyd*, 31 Neb., 730.

3. **SAME.** Upon marriage of an alien woman to a citizen of this country, she and her minor children become citizens.

An alien woman otherwise eligible to citizenship here may become a citizen by intermarrying with a citizen of this country, and her minor child, of a former marriage, brought by her to this country, and residing with her, will upon such marriage to a citizen of this country, *ipso facto*, become also a citizen along with his mother. (*Post*, p. 717.)

Cases cited and approved: *United States v. Kellar* (C. C.), 13 Fed., 82; *Kreitz v. Behrensmeyer* (Ill.), 17 N. E., 232, 8 Am. St. Rep., 349.

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4. EVIDENCE. Incompetent admitted without objection must be considered.

Evidence admitted in the trial court without objection must be considered, although hearsay, or otherwise incompetent. (*Post*, p. 718.)

Cases cited: *Groves v. Gordon*, 3 Brev. (S. C.), 245; *Schuster v. State*, 80 Wis., 107; *Lucas v. United States*, 163 U. S., 612.

5. ALIENS. Where alien heirs cannot inherit the citizen heirs will take the whole inheritance.

Where some of the heirs are barred of an inheritance because of their alienage, the whole estate must go to the heirs who are citizens of this country and capable of taking the inheritance. (*Post*, pp. 718, 719.)

Case cited and approved: *Orr v. Hodgson*, 4 Wheat., 453.

6. SAME. Capacity to inherit depends upon statutes or treaties. An alien has no inheritable blood, under the common law, and, if he take at all, he must do so under statutes of the State where the property is, or by the provisions of treaties. (*Post*, p. 719.)

Case cited and approved: *Baker v. Shy*, 9 Heis., 85.

7. SAME. Statutes on subject superseded by other statutes.

Sections 1998 to 2000, inclusive, of the Code of 1853, regulating the right of aliens to hold land by purchase or inheritance, are superseded or repealed by implication by Acts 1875, ch. 2, reproduced in Shannon's Code, as sections 3659 and 3660, on the same subject and providing that the heirs of an alien may take land by descent or otherwise as native citizens. (*Post*, pp. 719, 720, 725.)

8. SAME. Acts 1883, ch. 250, applies only where all the heirs are aliens.

Acts 1875, ch. 2 (Shannon's Code, sections 3559, 3660), providing that aliens may take and hold property, and that their heirs may take land by descent as native citizens, and Acts 1883, ch. 250 (Shannon's Code sections 3661, 3662), providing for the dis-

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tribution of property where the decedent's nearest of kin are aliens must be construed together; and said act of 1883, operating as a limitation upon the rights granted by said act of 1875, must be strictly construed, and so construed it applies only where all the heirs are aliens. (*Post*, pp. 719, 720, 725, 726.)

9. TREATIES. Prevail over statutes of a state.

In case of a conflict between the statute of a State and the terms of a treaty made under the authority of the United States, the treaty must prevail. (*Post*, pp. 723-725.)

Cases cited and approved: (*Baker v. Shy*, 9 Heis., 85; *Hauenstein v. Lynham*, 100 U. S., 483; *Cooper*, *Ex parte*, 143 U. S., 472; *Whitney v. Robertson*, 124 U. S., 190; *United States v. Rauscher*, 119 U. S., 407; *Blythe v. Hinckly*, 180 U. S., 333; *Succession of Rabasse*, 47 La. Ann., 1455; *Opel v. Shoup*, 100 Iowa, 424; *Yeaker v. Yeaker*, 4 Metc. (Ky.), 33; *Succession of Rixer*, 32 L. R. A., 177-189, note, 81 Am. Dec., 538, and note; *Schultze v. Schultze* (Ill.), 33 N. E., 201, 19 L. R. A., 90, 36 Am. St. Rep., 432; *Kull v. Kull*, 87 Hun, 476.

10. SAME. Formal claim of rights under treaties need not be made in pleadings.

Where a complainant based his claim upon the provisions of a treaty made under the authority of the United States, it is not necessary to make a formal claim of his rights under the treaty since such treaties are as much a part of the laws of every State as its own local laws and constitution. (*Post*, pp. 715, 716, 721, 722, 726.)

Cases cited and approved: *Hauenstein v. Lynham*, 100 U. S., 483; *Blythe v. Hinckly*, 173 U. S., 501, 508.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
F. H. HEISKELL, Chancellor.

Ehrlich v. Weber.

STATEMENT OF FACTS MADE BY MR. JUSTICE NEIL.

This case involves a contest over the ownership and division of the estate of Adolph Weber, Jr., deceased.

The complainant was born in Leipsic, in the kingdom of Saxony, on the 9th day of September, 1860. Between the latter date and the year 1865 or 1866 his father, after cruelly treating his mother, Wilhelmina Ehrlich, deserted her and abandoned his family. The said Wilhelmina, after having secured a divorce from her husband, came to this country about the year 1866, bringing with her the complainant, then a child of about six years, and settled in Memphis, Tennessee with the purpose of making that city her future home.

During the year 1868 she intermarried with Adolph Weber, Sr., who was then residing in Memphis. He and his wife continued to reside there until his death, a few years later. Of this marriage were born in Memphis, Tennessee, the defendant, Emma Weber, and Adolph Weber, Jr. The latter died intestate in Memphis in the month of November, 1903, leaving a valuable estate, which is the subject of the present controversy. He was never married. Wilhelmina, the mother of the said Emma, Adolph, Jr., and of complainant, also resided in Memphis until her death in the year 1896.

Adolph Weber, Sr., was born in Stuttgart, in the kingdom of Wurttemberg. This is proved by statements, unobjected to in the court below, which defendant, Emma Weber, testified were made to her by her mother; al-

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so by the testimony of Caroline Heinrichs, who deposed, also without objection, that Adolph Weber, Sr., told her that he came from Wurttemberg; also that she herself came from the same country, and that, on talking with him, she found that he knew the towns in that country with which she was familiar; also that he spoke the German language like a native, and that he spoke English brokenly. It is not proven that he ever obtained naturalization papers, or that he ever voted, sat on a jury, or exercised any other of the political rights of citizenship in this country.

The complainant has resided in this country since he came here with his mother in 1866—part of the time in this State, part in Nebraska, part in Illinois. It is not shown that he ever obtained naturalization papers, or that he ever exercised any of the political rights of citizenship in either of the States in which he had resided.

In the bill complainant describes himself as a “resident” of the State of Illinois. In the answer defendant averred that he was an alien, and insisted that he was for that reason not entitled to share in the estate of his half-brother, Adolph Weber, Jr. This appeared in the form of an amendment to the answer. On the same day the complainant was permitted to amend his bill so as to add the following to the prayer, viz.:

“And should it appear that complainant is mistaken in his belief that he is a citizen of the State of Illinois, or should it appear that he is not a citizen of the United States, but was at the time of the death of said brother

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a citizen of any other foreign government, or subject of any foreign king or ruler or prince, then he prays that he have the benefit of any and all treaties or conventions with such state or government, king, ruler, or prince which may have been entered into between the United States and such foreign power touching the rights of aliens, and especially under the law of the land as proclaimed and established in the treaty with the king of Saxony of 1846, and with the king of Prussia of the year 1828, and duly ratified according to law by the United States."

The chancellor decreed that the complainant was entitled to an equal interest in the estate with his half-sister, defendant, Emma Weber. From this decree she has appealed and assigned errors.

R. B. GOODWIN, for complainant.

EDGINGTON & EDGINGTON, for defendant.

MR. JUSTICE NEIL, after making the foregoing statement of facts, delivered the opinion of the Court.

Regardless of whether the said Wilhelmina and her husband Adolph Weber, Sr., were aliens, their children, Emma and Adolph, Jr., having been born in this country and under its jurisdiction, became at once, by virtue of such birth, American citizens. *United States v. Wong Kim Ark*, 169 U. S., 649, 18 Sup. Ct., 456, 42 L. Ed., 890.

Rudolph C. Ehrlich, complainant, having been born

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in a foreign country, and hence an alien, his status of alienage would be presumed to continue, in the absence of proof that he had denationalized himself or ceased to be a citizen of his native land, and the mere fact of long residence in this country would not be sufficient to overcome the presumption thus arising. *Hauenstein v. Lynham*, 100 U. S., 483, 25 L. Ed., 628; *Green v. Salas* (C. C.), 31 Fed., 107; *Bode v. Trimmer*, 82 Cal., 517, 23 Pac., 188; *State, ex rel. Thayer, v. Boyd*, 31 Neb., 730, 48 N. W., 753, 51 N. W., 602.

The same conclusion holds in respect of Adolph Weber, Sr., and of his wife, Wilhelmina. Hence, while it is true, as contended by complainant's counsel, that an alien woman, otherwise eligible to citizenship here, may become a citizen by intermarrying with a citizen of this country, and that her minor child, of a former marriage, brought by her to this country and residing with her, will, upon such marriage to a citizen of this country, *ipso facto*, become also a citizen along with his mother (*United States v. Kellar* (C. C.), 13 Fed., 82; *Kreitz v. Behrensmeyer* (Ill.), 17 N. E., 232, 8 Am. St. Rep., 349), there is nothing in this case upon which to rest such a conclusion in favor of the complainant. His mother was clearly not a citizen, aside from any consideration of her intermarriage with Adolph Weber, Sr., and that marriage did not confer citizenship upon her, for the reason that Adolph Weber, Sr., was not himself a citizen. The facts stated concerning his origin are sufficient to show that he was an alien. The testimony of Emma Weber

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upon this subject, set out in the statement, would, no doubt, have been excluded in the court below, as pure hearsay, if a proper objection had been interposed; but there was no objection, and the evidence must be considered. The testimony of Mrs. Heinrichs as to the statements made to her by Adolph Weber, Sr., as to the place of his birth, should probably have been held competent, even if an exception had been interposed. *Groves v. Gordon*, 3 Brev. (S. C.), 245. But see *Schuster v. State*, 80 Wis., 107, 49 N. W., 30. We are referred to *Lucas v. United States*, 163 U. S., 612, 16 Sup. Ct., 1168, 48 L. Ed., 282, as a controlling authority against the admissibility of the evidence. It is, indeed, held in that case that such evidence would not be admissible for the purpose of sustaining the jurisdiction of the court in a criminal case; but it is conceded in the opinion that in a contest over property rights the admission of the deceased person as to his status "might be competent" against those claiming under him. At all events, this evidence must be allowed, no objection having been offered in the trial court. Considering together all of the facts recited upon this subject in the statement, we are of the opinion that they are sufficient to justify the conclusion that Adolph Weber, Sr., was an alien, and that he never became a citizen of this country.

If by reason of alienage the complainant be barred of the inheritance, the whole estate must go to defendant, Emma Weber, who is a citizen of this country, and cap-

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able of taking the inheritance. *Orr v. Hodgson*, 4 Wheat., 453, 4 L. Ed., 613.

An alien has no heritable blood under the common law, and, if he take at all, he must do so under statutes of the State where the property is, or by the provisions of treaties. *Baker v. Shy*, 9 Heisk., 85.

The statutes of this State bearing upon the question are the following, viz.:

Sections 1998, 1999, 2000, of the Code of 1858.

"Sec. 1998. An alien may take and hold real estate in this State, by purchase, inheritance, or in any other way which may be agreed upon by treaty between the United States and the country of which he is a citizen or subject.

"Sec. 1999. Any alien resident in this State, who has legally declared his intention, under the naturalization laws, to become a citizen of the United States, may take and hold, dispose of or transmit by descent, any real estate, as a native citizen.

"Sec. 2000. An alien who is a resident in the United States at the time of the death of an intestate, and has declared, or shall within twelve months thereafter declare his intention, according to the acts of congress, to become, a citizen, shall be capable of inheriting the estate of such intestate."

Shannon's Code, sections 3659, 3660, containing the provisions of chapter 2, p. 4, Acts 1875:

"Sec. 3659. Aliens to Hold and Dispose of Property. An alien, resident, or nonresident, may take and hold

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property, real or personal, in this State, either by purchase, descent, or devise, and dispose of or transmit same by sale, descent, or devise, as a native citizen; and in all cases where aliens, resident or nonresident, have heretofore acquired title to property, real or personal, in this State, in a lawful manner, said aliens, their assigns, heirs, devisees, or representatives, shall hold and dispose of the same in the same manner as native citizens.

“Sec. 3660. Heirs of Aliens may Inherit. The heir or heirs of an alien, whether resident or nonresident of the United States, may take any lands, so held by descent, or otherwise, as citizens of the United States.”

The act of 1883, p. 330, c. 250, viz. :

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that hereafter when any person dies, a resident of this State, intestate and without issue, possessed of real or personal property, and when nearest of kin are aliens to the United States, the same shall be distributed as follows:

“First. By his brothers and sisters of the whole blood, born before his or her death, or afterwards, to be divided among them equally, and if any such brother or sister died in the intestate's lifetime, bearing issue, such issue shall represent their deceased parent, and be entitled to the same part of the estate of the uncle or aunt as their father or mother would have been entitled to, if living. In default of brothers and sisters, or their issue, the said estate shall be inherited by the father and mother of the intestate equally; if both be dead, the

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equal moieties by the heirs of the father and mother, in equal degrees, or representing them in equal degrees of relationship to the intestate; but if such heirs or those they represent do not stand in equal degree of relationship to the intestate, then the heirs nearest in blood to the intestate shall take in preference to others more remote.

"Section 2. Be it further enacted, that any alien to whom property, personal or real, shall descend under the provisions of this act, shall have the right to hold, sell, alienate, and convey the same in as full and ample a manner as if he or she were a citizen of the United States."

The treaty provisions bearing upon the controversy are articles 2 and 3 of the treaty of May 4, 1845, ratified August 12, 1846, between the United States and the king of Saxony, viz.:

"Art. 2. Where, on the death of any person holding real property within the territories of one party, such real property would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, or where such real property has been devised by last will and testament to such citizen or subject, he shall be allowed a term of two years from the death of such person—which term may be reasonably prolonged according to circumstances—to sell the same and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction on the part of the government of the respective states.

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"Art. 3. The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise; and their heirs, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

Treaties and Conventions between U. S. and Other Powers, pp. 981, 982 (9 Stat., 830, 831).

The treaty made between the United States and the German Empire soon after the formation of the latter does not appear, upon examination, to have carried any purpose of abrogating or annulling the treaties in existence at that time between the states composing the German Empire and foreign countries. Treaties and Conventions, etc., pp. 363-369 (17 Stat., 921-933). See, also, comment upon this subject in *Wunderle v. Wunderle* (Ill.), 33 N. E., 195, 19 L. R. A., 84, 86; *In re Thomas*, 12 Blatchf., 370, Fed. Cas. No. 13,887. That treaty, perhaps it may be said, impliedly recognized the former treaties referred to, so far as property rights were concerned, in the following provision appearing in the last paragraph of article 10, viz.: "In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they

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would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised." Treaties and Conventions, etc., page 366 (17 Stat., 926).

Our statute controlling the inheritance of our own citizens in cases similar to the present is the following:

"If the estate was acquired by the intestate, and he died without issue, his land shall be inherited by his brothers and sisters of the whole and half blood, born before his death or afterwards, to be divided amongst them equally." Shannon's Code, section 4163, subsec. 2.

Under our statute of distributions, the personalty, in case of the death of both the father and mother of the intestate, would be divided equally between brothers and sisters. Shannon's Code, section 4172, subsec. 5.

In case of a conflict between the statutes of a State and the terms of the treaty, the latter must prevail, since the federal constitution provides that "All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding" (article 6). *Hauenstein v. Lynham*, supra; *Ex parte Cooper*, 143 U. S., 472, 12 Sup. Ct., 453, 36 L. Ed., 232; *Whitney v. Robertson*, 124 U. S., 190, 8 Sup. Ct., 456, 31 L. Ed., 386; *United States v. Rauscher*, 119 U. S., 407, 7 Sup. Ct., 234, 30 L. Ed., 425; *Blythe v. Hinckly*, 180 U. S., 333, 21 Sup. Ct., 390, 45 L. Ed., 557.

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This rule has been recognized in this State (*Baker v. Shy*, supra) and in other States (*Succession of Rabasse*, 47 La. Ann., 1455, 17 South., 867, 49 Am. St. Rep., 435; *Opel v. Shoup*, 100 Iowa, 424, 69 N. W., 563, 37 L. R. A., 586; *Yeaker's Heirs v. Yeaker's Heirs*, 4 Metc. (Ky.), 33, 81 Am. Dec., 530). And see extended note to *Succession of Rixner*, 32 L. R. A., 177-189, 81 Am. Dec., 538, note.

In *Blythe v. Hinckly*, supra, it is said: "This court has held from the earliest times, in cases where there was no treaty, that the laws of the State where the real property was situated governed the title, and were conclusive in regard thereto." 180 U. S., 341, 21 Sup. Ct., 393, 45 L. Ed., 557. Again: "Questions have arisen as to the rights of aliens to hold property in a State under treaties between this government and foreign nations which directly provide for that right, and it has been said that in such case the right of aliens was governed by the treaty, and, if that were in opposition to the law of the particular State where the property was situated, in such case the State law was suspended during the treaty or term provided for therein." Id.

The clear meaning of article 2 of the treaty is, touching the right of inheritance, that the aliens protected thereby shall have the same right as citizens in the same situation—that is, shall inherit just as they would if they were citizens—with the qualification that this right shall be subject to the exercise of a power to sell the land and withdraw the proceeds within a time limited.

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It was held in *Schultze v. Schultze* (Ill.), 33 N. E., 201, 19 L. R. A., 90, 36 Am. St. Rep., 432, construing similar language in another treaty, that the alien took "a fee, determinable by the non exercise of the power of sale within" the time limited; approving *Kull v. Kull*, 37 Hun, 476.

On the theory that the rights of the complainant are controlled wholly by the treaty, it would result that he would take an interest in the land according to Shannon's Code, section 4163, subsec. 2, above quoted, qualified by the necessity of selling within the two years limited in the treaty, or within such reasonable time thereafter as the court might fix; also that he would have the right to file a bill for partition, preparatory to a sale, as was done in this case. *Schultze v. Schultze*, supra.

But as held in *Blythe v. Hinckly*, supra, there is no incapacity on the part of the State to give to aliens more than the treaty vouchsafes to them. This view of the matter necessitates an inquiry into the meaning of our statutory provisions purporting to regulate the rights of aliens in property situated in this State.

The act of 1875, reproduced in Shannon's Code in sections 3659 and 3650, was designed by the legislature to completely cover the ground, and in fact did so; thereby superseding the provision of the Code of 1858, and operating as an implied repeal of those sections. This act placed aliens in all respects, as to the succession to property, in the same situation as citizens.

The act of 1883 relating to the same subject must be construed *in pari materia* with the act of 1875, but, operating as a limitation upon the rights granted by the

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former act, must be strictly construed. So construing it, we hold that it only applies to a case in which all of the heirs are aliens; and inasmuch as one of the two heirs to the estate in controversy in the present case is a citizen, and one an alien, the act does not apply to the case before us, and the act of 1875 controls, with the result that the complainant takes a full half interest in the estate.

It is perhaps needless to add that the act of 1883 could not in any event regulate the rights of the parties in any case falling within the terms of the treaty copied above, since its provisions are in clear contravention of the treaty.

If it was required of the complainant to make formal claim of his rights under the treaty, the demand was sufficiently made in the pleadings; but we are of opinion that no such demand was necessary, since "the constitution, laws, and treaties of the United States, are as much a part of the laws of every State as its own local laws and constitution." *Blythe v. Hinckly*, 173 U. S., 501, 508, 19 Sup. Ct., 497, 43 L. Ed., 783, 786. "This," it was said in *Hauenstein v. Lynham*, 100 U. S., 483, 25 L. Ed., 628, "is a fundamental principle in our system of complex national policy."

The chancellor committed no error in the matter of costs and commissions complained of in the brief of defendant's counsel.

The costs of the court below will be paid as decreed by the chancellor.

The defendant will pay the costs of this court.

Railroad v. Ridley.

MOBILE & OHIO RAILROAD COMPANY v. MARY RIDLEY.

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116	209

(Jackson. April Term, 1905.)

1. **DEMURRER.** Not acted on in lower court cannot be assigned as error in supreme court.

An assignment of error in the supreme court that the lower court improperly overruled a demurrer to the declaration cannot be sustained, when it does not appear from the record that the demurrer was ever called up or acted upon in the lower court. (*Post*, p. 729.)

2. **PERSONAL INJURIES.** In an attempt to save human life imperiled by great danger in a sudden emergency.

It is not only lawful, but a laudable act, to attempt to save human life when it is imperiled by great danger, and in a sudden emergency, and in such cases the courts will not require the intending rescuer to stop, and hesitate, and weigh probabilities until it is too late to make the rescue, but it is sufficient if he acts with such care as a reasonably prudent and careful person would use in such emergencies, and under similar environments. (*Post*, pp. 729-738, and especially p. 738.)

3. **SAME. Same.** Rescuer of human life in imminent danger in a sudden emergency is not guilty of such contributory negligence as would bar an action for his wrongful death, when.

Where a person, acting in a sudden emergency and using such care as a reasonably prudent and careful person would use in such emergencies and under similar environments, loses his life in the attempt to save the life of another in imminent danger from the wrongful, careless, and negligent act or conduct of the defendant, he is not guilty of such contributory negligence as will bar a recovery for his wrongful death.

Cases cited and approved: *Light & Power Co. v. Hodges*, 109 Tenn., 331; *Pennsylvania Co. v. Roney*, 89 Ind., 453; *Linehan v.*

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Sampson, 126 Mass., 506; Eckert v. Railroad, 48 N. Y., 503; Gibney v. State, 137 N. Y., 6; Pennsylvania Co. v. Langendorf, 48 Ohio St., 316; Spooner v. Railroad, 115 N. Y., 34; Donahoe v. Railroad, 83 Mo., 560.

4. **SAME. Same. Same. Recovery for wrongful death of a railroad employee caused in rescuing a boy in imminent danger from a rapidly approaching train; case in judgment.**

Where a railroad employee, on observing a small boy about eight years old standing on the railroad track with his back to a rapidly approaching train which had failed to give the statutory signals, rushed on the track and either pushed the boy, or so attracted his attention and alarmed him, that he ran off the track so that his life was saved, but slipped or stumbled himself, and in consequence of which he was struck by the engine and killed, a finding by the jury that such employee acted with due care under the circumstances was justified.

FROM OBION.

Appeal from the Circuit Court of Obion County.—
R. E. MAIDEN, Judge.

SWIGGART & SPRADLIN, for Railroad.

MOORE & COCHRAN and LANNON & STANFIELD, for Ridley.

MR. JUSTICE WILKES delivered the opinion of the Court.

Railroad v. Ridley.

This is an action for damages resulting in the death of Bill Ridley, colored. It was brought by his widow. There was a trial before a jury, which resulted in a verdict and judgment for \$1,000, and the railroad company has appealed, and has assigned quite a number of errors.

There was a demurrer filed to the declaration, stating as a ground that it failed to aver that the deceased at the time of the injury was exercising due caution and care, or to make any statement of facts rendering it unnecessary to make such averment.

In the brief of counsel for the railroad, it is said that this demurrer was overruled, and that the defendant excepted to the action of the court, and we are referred to page 4 of the record to verify this statement.

We do not find such recital on page 4 of the transcript, nor elsewhere; and, on examination of the record, we do not find that the demurrer was ever called up or acted upon. We assume, therefore, that counsel made this statement in his brief inadvertently, or that the record, as it comes to us, is defective and incomplete.

The first assignment of error, being that the court improperly overruled the demurrer, is therefore bad.

The facts, so far as necessary to be stated, are that the deceased, with another laborer, was working upon the track of the railroad company in the yards at Union City. Three or four boys, about eight years old, on their way to school, stopped to watch these laborers at their work. One of the boys, named Harry Cloys, was standing upon the track when a freight train came from the

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north, running quite rapidly—some eighteen to twenty-five miles an hour. When it approached the place where these men were at work, they stepped off from the track, one upon one side, and the other upon the other. The little boy, Harry Cloys, was standing upon the track, with his back towards the approaching train, watching the men, and unaware of the approach of the train.

There is some question as to whether the whistle was blown a mile from the corporate limits, as the statute requires, but the weight of the proof is that the bell was not thereafter rung or the whistle blown before the happening of the accident.

The deceased had quit work, and had stepped aside for the train to pass, and was himself in a place of safety; but he saw the peril of the boy, and, acting upon the impulse of the moment, rushed upon the track to rescue him and to save his life. He either pushed him off the track, or so attracted his attention and alarmed him that the boy ran off the track; but the deceased, in rushing upon the track, slipped and partially fell, and was struck by the engine, and killed.

It is said in the fifteenth assignment of errors that while the railroad company might be required to show an observance of the statutory precautions, so far as the boy was concerned, and might be liable for any injury to him in case of its failure to observe such precautions, yet it owed no such duty to the deceased, who was an employee of the road, and went upon the track in the immediate front of the approaching train.

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The court virtually charged this, in substance, and made the liability of the company depend upon the action of the deceased in going upon the track at the time, in the manner, and for the purpose that he did.

It is assigned as error that there is no evidence to support the verdict, and that the facts made out by the plaintiff, which we have very briefly stated, do not furnish any grounds for a recovery.

This is based upon the theory that the deceased, in going upon the track immediately in front of the moving train, was guilty of such contributory negligence as must bar his recovery, even though his object and purpose was to save the life of a boy who was in imminent danger of being run over and killed.

The theory upon which plaintiff seeks to recover is that this boy, eight years old, had been put in a position of imminent peril and danger by the negligence of the defendant road, and that the deceased, in order to save the boy's life, rushed upon the track in the manner and for the purpose stated.

There can be no dispute that the plaintiff's intestate did go upon the track immediately in front of the moving train, and for the laudable purpose of saving the boy's life, and that the boy was in imminent danger from the careless and negligent operation of the defendant's train, and that the deceased was killed while engaged in this effort to save life.

We think, also, that the weight of the evidence is that the deceased slipped or stumbled upon the track, and,

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in consequence of this mishap, was caught by the train, when he would not otherwise have been struck.

So that the crucial question in the case is, was the deceased justifiable in going before a moving train for such a purpose, and was he guilty of such reckless and negligent conduct in attempting to make the rescue as must necessarily or probably result in his own death?

Upon this feature of the case the trial judge charged very fully; saying, among other things, in substance, that the jury must determine whether deceased was guilty of negligence in going upon the track as he did in order to save the life of the boy; and did he, in so doing, do anything or omit to do anything that a reasonably prudent, cautious man would not have done or omitted to do under the circumstances?

Again, that if a reasonably prudent man, under the circumstances, would have attempted the rescue of the boy, then the deceased was not guilty of such negligence in making the attempt as would bar his recovery; but if a reasonably prudent man, under the circumstances, would not have attempted to rescue, then plaintiff should not recover. However, under such circumstances, he added, the law would not exact of a man that measure of calm and deliberate judgment as in cases where no emergency existed, and especially where the emergency was produced by the wrong or fault of the defendant, and called for prompt decision and quick action in order to be effective.

He told the jury to look to the situation of the boy—

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whether he could probably have escaped himself, and, if not, whether deceased had reason to believe that he could rescue him without injury to himself— and, if an attempt to rescue under such circumstances would involve a danger so obvious and glaring that a reasonably prudent man would not attempt it, then, if the deceased did attempt it, it would be such rashness as must bar any recovery.

He then charged fully the reverse of this proposition.

He charged this idea and theory, in different form and different language, repeatedly and very fully, and told the jury, among other things, that if the deceased's negligence was the proximate cause of the injury, or if it proximately contributed to the injury, he could not recover.

In the case of *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn., 331, 70 S. W., 616, 60 L. R. A., 459, 97 Am. St. Rep., 844, this court, speaking through the chief justice, said:

"It seems to be well settled that, when a person is exposed to peril of life or limb through the negligence of another, the latter will be liable in damages for injuries received by a third party in a reasonable effort to rescue the one so imperiled." Citing *Pennsylvania v. Roney*, 89 Ind., 453, 46 Am. Rep., 173; *Linehan v. Sampson*, 126 Mass., 506, 30 Am. Rep., 692; *Eckert v. R. Co.*, 43 N. Y., 503, 3 Am. Rep., 721; *Gibney v. State*, 137 N. Y., 6, 33 N. E., 142, 19 L. R. A., 365, 33 Am. St. Rep., 690.

"But even in such a case the rescuer must not rashly

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expose himself to danger." *Penn. Co. v. Langendorf*, 48 Ohio St., 316, 28 N. E., 172, 13 L. R. A., 190, 29 Am. St. Rep., 553.

In the case of *Eckert v. L. & N. R. Co.*, *supra*, the evidence showed that the train was approaching in plain view of the deceased, and that there was a small child upon the track, who must inevitably be crushed by the rapidly approaching train if not rescued. Under these circumstances, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from appearances, he believed that he could, it was not negligence to make an attempt to do so, although he might believe that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs or in the mere protection of property knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligence, unless such

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as must be regarded as either rash or reckless." The jury were warranted in finding the deceased free from negligence under the rule as above stated.

In *Gibney v. State of New York*, 137 N. Y., 6, 33 N. E., 142, 19 L. R. A., 365, 33 Am. St. Rep., 690, a child walking with its parents fell through a defective bridge into the canal below. The father immediately plunged into the canal, and both father and son were drowned. It was contended by the State that, while the defective bridge may have been the cause of the boy's death, it could not be regarded as the cause of the death of the father, although his death occurred in an attempt to save the life of the child. The court held that the peril to which the child was exposed was the result of the negligence of the State, and that the peril to which the father exposed himself was the natural consequence of the situation. The court said: "We think it may justly be said that the death of both the child and parent was the consequence of the negligence of the State, and that the unsafe bridge was, in a legal and judicial sense, the cause of the drowning of both."

In the case of *Penn. Co. v. Langedoff*, 48 Ohio St., 316, 28 N. E., 172, 13 L. R. A., 190, 29 Am. St. Rep., 553, it is said: "To entitle one to relief for the consequences of the act of another, it is by no means necessary that the injured party should have been in the discharge of any duty whatever at the time. His rights, in this respect are perfect when he is in the performance of any lawful

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act, and, in some States and in some instances, when the act is not strictly lawful."

It is further said in the case "that the act of the defendant in error was not only lawful, but in the highest degree commendable."

It was also said: "There was only a fraction of a minute in which to resolve and to act, or action would come too late. Under these circumstances, it would be unreasonable to require the exercise of judgment by one in a position to afford relief. To require one so situated to stop and weigh the dangers in attempting to rescue another, and compare them with those hanging over the person to be rescued, would be in fact to deny the rescue altogether, if the danger were imminent. The attending circumstances must be regarded—the alarm, the excitement, the confusion, usually present on such occasions. The uncertainty that the proper movement would be made, the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are forced by the strongest dictates of humanity to decide and act in a sudden emergency. And the doctrine that one who under such circumstances springs to the rescue of another, thereby encountering great danger to himself, is guilty of negligence *per se*, is supported by neither principle nor authority; and at last the rule is, 'What would a reasonably prudent man have done under similar circumstances?' "

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In the case of *Spooner v. R. R.*, 115 N. Y., 34, 21 N. E., 696, the *Eckert* case was approved, and it was held that a person who steps upon a railroad track in a humane effort to save a young child cannot be considered a trespasser.

The rule as stated in 7 Am. & Eng. Ency. Law, p. 394, is as follows:

"It is said that one who is injured by the negligence of another in attempting to save the life of one imperiled by his negligence is not himself guilty of contributory negligence; but the true rule in such cases is that contributory negligence is a question of fact for the jury, and, if it appears that the attempt was not so rash as to entail certain injury, a recovery will be sustained.

"And the defendant will be liable if the person saved is incapable of contributory negligence or was free from such negligence, provided there was negligence on the part of the defendant towards such person or towards the plaintiff."

In the case of *Donahoe v. Wabash R. Co.*, 83 Mo., 560, 53 Am. Rep., 594, the facts were that Mrs. Donahoe was struck and injured by a train while trying to save the life of her infant child, which had wandered upon a railroad track in front of an approaching train. It was held in that case, among other things, that the negligence of the company as to the child is imputed to the company with respect to the mother, who attempted to rescue it; but, if the company was not guilty of negligence as to the

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child, then it would only be liable for negligence to the mother after her efforts to rescue the child had commenced.

We hold that it is not only a lawful, but a laudable act, to attempt to save human life when it is imperiled by great danger, and in a sudden emergency, and in such cases the courts will not require the person to stop and hesitate and weigh probabilities until it is too late to make the rescue; and the rule laid down by the trial judge is sufficiently strict—that the party attempting the rescue under such circumstances must use such care as a reasonably prudent and careful person would use in such emergencies and under similar environments.

In the present case the boy's life was in imminent danger—a danger brought about to a large extent by the negligent act of the railroad company, inasmuch as he was standing with his back to the approaching train, and could have been seen by any watchful lookout. No precautions were observed. The danger was imminent. Action must necessarily be prompt, or it would be too late, and the deceased was impelled with the commendable desire to save the boy's life.

Under these circumstances, he attempted to make the rescue; and, but for his slip or stumble, doubtless he would have been successful in preserving his own life as well as in rescuing the boy.

Under these circumstances, we think the jury was well warranted in rendering the verdict it did.

But for the action of the deceased, it appears manifest

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that the boy would have been run over and killed by the train, and the railroad company would have been liable, in all probability, for a much larger judgment than was given in the present case.

Upon the whole record, we think the merits of the case have been reached, and there is no reversible error; and the judgment of the court below is affirmed, with costs.

There are other errors assigned, which will be disposed of in a memorandum, which need not be published.



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*This index was prepared by R. T. Shannon, Esq., of the Nashville bar, and it affords me pleasure to acknowledge my obligation therefor.—Reporter.

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B. C. H.
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